No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

PETITIONERS' APPENDIX

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APPENDIX A

Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,

Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,

Appellees.

[Dec. 8, 2000]

PER CURIAM.

We have for review a final judgment of a Leon County trial court certified by the First District Court of Appeal as being of great public importance and requiring immediate resolution by this Court. We have jurisdiction. *See* art. V, § 3(b)(5), Fla. Const.[1] The final judgment under review denies all relief requested by appellants Albert Gore, Jr. and Joseph I. Lieberman, the Democratic candidates for President and Vice President of the United States, in their complaint contesting the certification of the state results in the November 7, 2000, presidential election.[2] Although we find that the appellants are entitled to reversal in part of the trial court's

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[1]The parties have agreed that this appeal is properly before this Court.

[2]The appellants have alternatively styled their request for relief as a Petition for Writ of Mandamus or Other Writs.

order and are entitled to a manual count of the Miami-Dade County undervote, we agree with the appellees that the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

On November 26, 2000, the Florida Election Canvassing Commission (Canvassing Commission) certified the results of the election and declared Governor George W. Bush and Richard Cheney, the Republican candidates for President and Vice President, the winner of Florida's electoral votes.[3] The November 26, 2000, certified results showed a 537-vote margin in favor of Bush.[4]

On November 27, pursuant to the legislatively enacted "contest" provisions, Gore filed a complaint in Leon County Circuit Court contesting the certification on the grounds that the results certified by the Canvassing Commission included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election."[5]

Pursuant to the legislative scheme providing for an "immediate hearing" in a contest action, the trial court held a two-day evidentiary hearing on December 2 and 3, 2000, and on December 4, 2000, made an oral statement in open court denying all relief and entered a final judgment adopting the oral statement. The trial court did not make any findings as to the factual allegations made in the complaint and did not reference any of the

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[3]*See* §§102.111 & .121, Florida Statutes (2000).

[4]Bush received 2,912,790 votes while Gore received 2,912,253 votes.

[5]*See* § 102.168(3)(c), Fla. Stat. (2000).

testimony adduced in the two-day evidentiary hearing, other than to summarily state that the plaintiffs failed to meet their burden of proof. Gore appealed to the First District Court of Appeal, which certified the judgment to this Court.

The appellants' election contest is based on five instances where the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes. These five instances, as summarized by the appellants' brief, are as follows:

> (1) The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach Canvassing Board as reflecting the clear intent of the voters;
>
> (2) The rejection of 168 net votes for Gore, identified in the partial recount by the Miami-Dade County Canvassing Board.
>
> (3) The receipt and certification after Thanksgiving of the election night returns from Nassau County, instead of the statutorily mandated machine recount tabulation, in violation of section 102.14, Florida Statutes, resulting in an additional 51 net votes for Bush.
>
> (4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's certified results; and
>
> (5) The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

For the reasons stated in this opinion, we find that the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm

Beach County Canvassing Board[6] and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board. However, we find no error in the trial court's findings, which are mixed questions of law and fact, concerning (3) the Nassau County Canvassing Board and the (4) additional 3300 votes in Palm Beach County that the Canvassing Board did not find to be legal votes. Lastly, we find the trial court erred as a matter of law in (5) refusing to examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually.

II. APPLICABLE LAW

Article II, section I, clause 2 of the United States Constitution, grants the authority to select presidential electors "in such Manner as the Legislature thereof may direct." The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today. We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 (1994) entitled "Determination of controversy as to appointment of electors." That section provides:

> If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures*, and such determination shall have been made at

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[6]Bush claims in his brief that the audited total is 176 votes. We make no determination as to which of these two numbers are accurate but direct the trial court to make this determination on remand.

> least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis supplied).

This case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000). Indeed, an important part of the statutory election scheme is the State's provision for a contest process, section 102.168, which laws were enacted by the Legislature prior to the 2000 election.[7] Although

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[7]In a substantial and dramatic change of position after oral argument in this case, Bush contends in his "Motion for Leave To File Clarification of Argument" that section 102.168 cannot apply in the context of a presidential election. However, this position is in stark contrast to his position both in this case and in the prior appeal. In fact, in Oral Argument on December 7, 2000, counsel for Bush agreed that the contest provisions contained in the Florida Election Code have placed such proceedings within the arena for judicial determination, which includes the established procedures for appellate review of circuit court determinations. Further, Bush's counsel, Michael Carvin, in the prior Oral Argument in *Palm Beach Canvassing Board v. Harris*, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not

> think there would be any problem in producing...*that kind of evidence in an election contest procedure*...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. So you would bring some orderliness to the process, and they would be able to resolve that evidentiary

courts are, and should be, reluctant to interject themselves in essentially political controversies, the Legisla-

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> question. One way or another, a court's going to have resolve it.

(emphasis supplied). Moreover, the Answer Brief of Bush in Case Nos. SC00-2346, 2348, and 2849 (Nov. 18, 2000 a page 18 states that "to implement Petitioners' desired policy of manual recounts at all costs, the Court is asked to . . . (5) substitute the certification process of Section 102.111 and Section 102.112 *for the contested election process of Section 102.168 as the means for determining the accuracy of the vote tallies*." (emphasis supplied). In addition, the December 5, 2000 brief of *Amici curiae of the Florida House of Representatives and the Florida Senate*, in case nos. SC00-2346, SC00-2348 & SC00-2349 (Dec. 5, 2000) at 8 "The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas *a complaint about punchcards generally undercounting votes* really raises a statewide issue that *should be pursued, if at all, only in a statewide contest*." (emphasis supplied). Finally the Amended Answer Brief of the Secretary of State asserted that

> [p]etitioner has confused a pre-certification election protest (section 102.166) with a post-certification contest (section 102.168). such facts and circumstances are usually discovered and raised in a contest action that cannot begin until after the election is certified. The Legislature imposed a deadline for certification because of the short time frame within which to begin and conclude an election contest. Petitioners are, in effect, asking this Court to delay the commencement of election contest actions, if any, by improperly using the protest procedures to contest the election before certification. *Because the facts and circumstances concerning voter error and ballot design in Palm Beach County are more properly raised in a contest action, these facts were not relevant to the Secretary's decision to certify the election. Her decision triggered the time for bringing any election contest actions.* (emphasis supplied).

ture has directed in section 102.168 that an election contest shall be resolved in a judicial forum. *See* § 102.168 (providing that election contests not pertaining to either house of the Legislature may be contested "in the circuit court"). This Court has recognized that the purpose of the election contest statute is "to afford a simple and speedy means of contesting election to stated offices." *Farmer v. Carson*, 110 Fla. 245, 251, 148 So. 557, 559 (1933).

In carefully construing the contest statute, no single statutory provision will be construed in such a way as to render meaningless or absurd any other statutory provision. *See Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995). In interpreting the various statutory components of the State's election process, then, a common-sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated. *Cf. Firestone v. News-Press Pub. Co.*, 538 So. 2d 457, 460 (Fla. 1989) (approving common-sense implementation of valid portion of section 101.121, Florida Statutes (1985) -- which broadly read, in pertinent part, that "no person who is not in line to vote may come [into] any polling place from the opening to the closing of the polls, except the officially designated watchers, the inspectors, the clerks of election, and the supervisor of elections or his deputy" -- so as not to exclude persons accompanying aged or infirm voters, children of voting parents, doctors entering the building to treat voters needing emergency care, or persons bringing food or beverages to the election workers because such activities are recognized as "incidental to the voting process and . . . sometimes necessary to facilitate someone else's ability to vote").

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five

days after certification following a protest pursuant to section 102.166(1), Florida Statutes (2000), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or *rejection of a number of legal votes sufficient to change or place in doubt the result of the election.*" § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he or she deems necessary to *ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances.*" (Emphasis added.)

The Legislature substantially revised section 102.168 in 1999.[8] That amendment preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined.[9] Moreover, rather than restraining the ac-

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[8]Viewed historically, section 102.168 did not always provide for contests of the type we consider today. As originally enacted, section 102.168 simply provided a mechanism for ouster of elected local officials. Under that version of the statute, election challenges were limited to county offices, and only the person claiming to have been rightfully elected to the position could challenge the election. *See* Ch. 38, Art. 10, §§ 7, 8, 9 (1845).

[9]The following language of section 102.168, Florida Statutes was changed in 1999 (words stricken are deletions; words underlined are additions):

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.
>
> (2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the cir-

cuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later. ~~adjourns, and~~

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

tions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked. *See* Fla. H. R. Comm. on

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(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Ch. 99-339, § 3, Laws of Florida.

amined or checked. *See* Fla. H. R. Comm. on Election Reform, HB 291 (1999) Staff Analysis (February 3, 1999).

Although the right to contest an election is created by statute, it has been a long-standing right since 1845 when the first election contest statute was enacted. *See* ch. 38, art. 10, §§ 7-9 Laws of Fla. (1845). As well-established in this State by our contest statute, "[t]he right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a *proper count*, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief." *State ex rel. Millinor v. Smith*, 107 Fla. 134, 139, 144 So. 333, 335 (1932) (emphasis added). The Staff Analysis of the 1999 legislative amendment expressly endorses this important principle. Similarly, the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

> Recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.
>
> Furthermore, with voting statistics tracing a decline in voter turnout and in increase in public skepticism, every effort should be made to ensure the integrity of the electoral process.
>
> Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always possible. In addition, voters and the media expect rapid and

> accurate tabulation of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing.

Id. at 15 (footnotes omitted). It is with the recognition of these legislative realities and abiding principles that we address whether the trial court made errors of law in rendering its decision.

III. ORDER ON REVIEW

Vice President Gore claims that the trial court erred in the following three ways: (1) The trial court held that an election contest proceeding was essentially an appellate proceeding where the County Canvassing Board's decision must be reviewed with an "abuse of discretion," rather than "de novo," standard of review; (2) The court held that in a contest proceeding in a statewide election a court must review all the ballots cast throughout the state, not just the contested ballots; (3) The court failed to apply the legal standard for relief expressly set forth in section 102.168(3)(c).

A. The Trial Court's Standard of Review

The Florida Election Code sets forth a two-pronged system for challenging vote returns and election procedures. The "protest" and "contest" provisions are distinct proceedings. A protest proceeding is filed with the County Canvassing Board and addresses the validity of the vote returns. The relief that may be granted includes a manual recount. The Canvassing Board is a neutral ministerial body. *See Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (Fla. 3d DCA 1984). A contest proceeding, on the other hand, is filed in circuit court and addresses the validity of the election itself. Relief that may be granted is varied and can be extensive. No appellate relationship exists between a "protest" and a "contest"; a protest is not a prerequisite for a

contest. *Cf. Flack v. Carter*, 392 So. 2d 37 (Fla. 1st DCA 1980) (holding that an election protest under section 102.166 was not a condition precedent to an election contest under section 102.168). Moreover, the trial court in the contest action does not sit as an appellate court over the decisions of the Canvassing Board. Accordingly, while the Board's actions concerning the elections process may constitute evidence in a contest proceeding, the Board's decisions are not to be accorded the highly deferential "abuse of discretion" standard of review during a contest proceeding.

In the present case, the trial court erroneously applied an appellate abuse of discretion standard to the Boards' decisions. The trial court's oral order reads in relevant part:

> The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000) (Proceedings at 10). The trial court further noted: "The court further finds that the Dade Canvassing Board did not abuse its discretion. . . . The Palm Beach County Board did not abuse its discretion in its review and recounting process."[10] In applying the abuse of discretion standard of review to the Boards' actions, the trial court relinquished an improper degree of its own authority to the Boards. This was error.

B. <u>Must all the Ballots be Counted Statewide?</u>

Appellees contend that even if a count of the undervotes in Miami-Dade were appropriate, section 102.168, Florida Statutes (2000), requires a count of all votes in Miami-Dade County and the entire state as opposed to a selected number of votes challenged. However, the

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[10] *Gore v. Harris*, No. 00-2808 (Fla. 2d Cir. Ct. Dec. ___, 2000) (*Proceedings* at 10-11).

plain language of section 102.168 refutes Appellees' argument.

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or *rejection of a number of legal votes sufficient to change or place in doubt the result of the election.*" § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances."

As explained above, section 102.168(3)(c) explicitly contemplates contests based upon a "rejection of a number of legal votes sufficient to change the outcome of an election." Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under section 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under section 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected. On the other hand, a consideration of "legal votes" contained in the category of "undervotes" identified statewide may be properly considered as evidence in the contest proceedings and, more importantly, in fashioning any relief.

We do agree, however, that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted. This election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process. This essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes.

We are dealing with the essence of the structure of our democratic society; with the interrelationship, within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to the authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the State of Florida the right to select the electors for President and Vice President of the United States:

> Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Id. In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of Florida.[11] Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the State of Florida, whether they be county commissioners or presidential electors.

When an election contest is filed under section 102.168, Florida Statutes (2000), the contest statute charges trial courts to:

> fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is *investigated, examined, or checked*, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Id. (emphasis added). Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief. In turn, this Court, consistent with legislative policy, has pointed to the "will of the voters" as the primary guiding principle to be utilized by trial courts in resolving election contests:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and

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[11]In other words, the Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. Of course, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict.

> it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly *the right to be heard.*

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). For example, the Legislature has mandated that no vote shall be ignored "if there is a clear indication of the intent of the voter" on the ballot, unless it is "impossible to determine the elector's choice . . . ." § 101.5614(5)-(6) Fla. Stat. (2000). Section 102.166(7), Florida Statutes (2000), also provides that the focus of any manual examination of a ballot shall be to determine the voter's intent. The clear message from this legislative policy is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.[12]

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[12]In the election contest at issue here, this Court can do no more than see that every citizen's vote be counted. But it can do no less. In a scenario somewhat analogous to that presented here, and in an election contest for a seat in the United States House of Representatives, the contesting candidate sought to *exclude* some 11,000 votes from being counted because the votes were not timely reported to the Secretary of State. *See State ex rel. Chappell v. Martinez*, 536 So. 2d 1007. This Court, in a unanimous opinion authored by Justice McDonald, refused to exclude the votes and held that the contesting candidate "has presented no compelling reason

The demonstrated problem of not counting legal votes inures to any county utilizing a counting system which results in undervotes and "no registered vote" ballots. In a countywide election, one would not simply examine such categories of ballots from a single precinct to insure the reliability and integrity of the countywide vote. Similarly, in this statewide election, review should not be limited to less than all counties whose tabulation has resulted in such categories of ballots. Relief would not be "appropriate under [the] circumstances" if it failed to address the "otherwise valid exercise of the right of a citizen to vote" of all those citizens of this State who, being similarly situated, have had their legal votes rejected. This is particularly important in a Presidential election, which implicates both State and uniquely important national interests. The contestant here satisfied the threshold requirement by demonstrating that, upon consideration of the thousands of undervote or "no registered vote" ballots presented, the number of legal votes therein were sufficient to at least place in doubt the result of the election. However, a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or "no registered vote" ballots of all Florida counties, as well as the legal votes already tabulated.

C. The Plaintiff's Burden of Proof

It is immediately apparent, in reviewing the trial court's ruling here, that the trial court failed to apply the statutory standard and instead applied an improper standard in determining the contestant's burden under the contest statute. The trial court began its analysis by stating:

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for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8." *Id.* at 1009.

> [I]t is well established and reflected in the opinion of Judge Joanos and Smith v. Tine[13] [sic], that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.
>
> It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.
>
> In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

This analysis overlooks and fails to recognize the specific and material changes to the statute which the Legislature made in 1999 that control these proceedings. While the earlier version, like the current version, provided that a contestant shall file a complaint setting forth "the grounds on which the contestant intends to establish his or her right to such office or set aside the result of

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[13] *Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st DCA 1982) (involving allegations of enumerated acts asserted to constitute fraud and misrepresentation to the electorate sufficient to produce a different result) (citing *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d DCA 1974), *cert. denied*, 303 So. 2d 21 (Fla. 1974) (involving a post-election challenge to a form of ballot which listed the candidates for a single office in alphabetical order using the same color ink, but on different lines)).

the election," the prior version did not specifically enumerate the "grounds for contesting an election under this section." Those grounds, as contained in the 1999 statute, now explicitly include, in subsection (c), the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change *or place in doubt* the result of the election." (Emphasis supplied.) Assuming that reasonableness is an implied component of such a doubt standard,[14] the determination of whether the plaintiff has met his or her burden of proof to establish that the result of an election is in doubt is a far different standard than the "reasonable probability" standard, which was applicable to contests under the old version of the statute, and erroneously applied and articulated as a "preponderance of a reasonable probability" standard by the trial court here. Where, as here, a person authorized to contest an election is required to demonstrate that there have been legal votes cast in the election that have not been counted (here characterized as "undervotes" or "no vote registered" ballots) and that available data[15] shows that, applying an analysis of the historical recovery rate of legal votes within those undervotes or "no vote registered" ballots, by extrapolation, a number of legal votes would be recovered from the entire pool of the subject ballots which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election. Here, there has been an undisputed showing of the existence of some 9,000 "under votes" in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest

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[14]*Cf. Standard Jury Instructions in Criminal Cases*, 697 So. 2d 84, 90 (Fla. 1997) (approving standard jury instruction regarding "reasonable doubt," which is "not a mere possible doubt, a speculative, imaginary or forced doubt," and which "may arise from the evidence, conflict in the evidence or the lack of evidence").

[15]In this case, the circuit court did not review the ballot presented as evidence.

showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or "no vote registered" ballots, has been made.

LEGAL VOTES

Having first identified the proper standard of review, we turn now to the allegations of the complaint filed in this election contest. To test the sufficiency of those allegations and the proof, it is essential to understand what, under Florida law, may constitute a "legal vote," and what constitutes rejection of such vote.

Section 101.5614(5), Florida Statutes (2000), provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Section 101.5614(6) provides, conversely, that any vote in which the board cannot discern the intent of the voter must be discarded. Lastly, section 102.166(7)(b) provides that, "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." This legislative emphasis on discerning the voter's intent is mirrored in the case law of this State, and in that of other states.

This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a "legal vote" that should be counted. *See McAlpin v. State ex rel. Avriett*, 155 Fla. 33, 19 So. 2d 420 (1944); *see also State ex rel. Peacock v. Latham*, 25 Fla. 69, 70, 169 So. 597, 598 (1936) (holding that the election contest statute "affords an efficient available remedy and legal procedure by which the circuit court can investigate and determine, not only the legality of the votes cast, but can correct any inaccuracies in the count of the ballots by having them brought into the court and examining the contents of the ballot boxes if properly preserved"). As the State has moved toward electronic

voting, nothing in this evolution has diminished the longstanding case law and statutory law that the intent of the voter is of paramount concern and should always be given effect if the intent can be determined. *Cf. Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976) (recognizing the overarching principle that, where voters do all that statutes require them to do, they should not be disfranchised solely because of failure of election officials to follow directory statutes).

Not surprisingly, other states also have recognized this principle. *Cf. Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996) (holding that a vote should be counted as a legal vote if it properly indicates the voter's intent with reasonable certainty); *Duffy v. Mortensen*, 497 N.W.2d 437 (S.D. 1993) (applying the rule that every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the clear contrary); *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (holding that votes could be recounted by manual means to the extent that the voter's intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment).

Accordingly, we conclude that a legal vote is one in which there is a "clear indication of the intent of the voter." We next address whether the term "rejection" used in section 102.168(3)(c) includes instances where the County Canvassing Board has not counted legal votes. Looking at the statutory scheme as a whole, it appears that the term "rejected" does encompass votes that may exist but have not been counted. As explained above, in 1999, the Legislature substantially revised the contest provision of the Election Code. *See* H.R. Comm. on Election Reform, HB 281 (February 3, 1999). One of the revisions to the contest provision included the codification of the grounds for contesting an election. *See id.* at 7. The House Bill noted that one of the

grounds for contesting an election at common law was the "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." As noted above, the contest statute ultimately contained this ground for contesting the results of an election.

To further determine the meaning of the term "rejection", as used by the Legislature, we may also look to Florida case law. In *State ex rel. Clark v. Klingensmith*, 121 Fla. 297, 163 So. 704 (1935), an individual who lost an election brought an action for quo warranto challenging his opponent's right to hold office. The challenger challenged twenty-two ballots, which he divided into four groups. One of these groups included three ballots that the challenger claimed had not been counted. *See* 121 Fla. at 298, 163 So. at 705. This Court concluded that "the *rejection* of votes from legal voters, not brought about by fraud, and not of such magnitude as to demonstrate that a free expression of the popular will has been suppressed," is insufficient to void an election, "at least unless it be shown that the votes rejected would have changed the result." 121 Fla. at 300, 163 So. at 705. Therefore, the Court appears to have equated a "rejection" of legal votes with the failure to count legal votes, while at the same time recognizing that a sufficient number of such votes must have been rejected to merit relief. This notion of "rejected" is also in accordance with the common understanding of rejection of votes as used in other election cases. In discussing the facts in *Roudebush v. Hartke*, 405 U.S. 15 (1972), the United States Supreme Court explained:

> If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject

ballots initially counted and count ballots initially rejected. *Id.*

This also comports with cases from other jurisdictions that suggest that a legal vote will be deemed to have been "rejected" where a voting machine fails to count a ballot, which has been executed in substantial compliance with applicable voting requirements and reflects, the clear intent of the voter to express a definite choice. *See In re Matter of the Petition of Katy Gray-Sadler*, 753 A.2d 1101, 1105-06 (N.J. 2000); *Moffat v. Blaiman*, 361 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976).

Here, then, it is apparent that there have been sufficient allegations made which, if analyzed pursuant to the proper standard, compel the conclusion that legal votes sufficient to place in doubt the election results have been rejected in this case.

THIS CASE

We must review the instances in which appellants claim that they established that legal votes were rejected or illegal voters were included in the certifications.

The refusal to review approximately 9,000 additional Miami-Dade Ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

On November 9, 2000, the Miami-Dade County Democratic Party made a timely request under section 102.166 for a manual recount.[16] After first deciding against a full manual recount, the Miami-Dade County Canvassing Board voted to begin a manual recount of all

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[16]On November 9, 2000, a manual recount was requested on behalf of Vice-President Gore in four counties — Miami-Dade, Broward, Palm Beach and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

ballots cast in Miami-Dade County for the Presidential election, and the manual recount began on November 19, 2000. On November 21, 2000, this Court issued its decision in *Palm Beach Canvassing Board v. Harris*, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), stating that amended certifications must be filed by 5 p.m. on Sunday, November 26, 2000. The Miami-Dade Canvassing Board thereafter suspended the manual recount and voted to use the election returns previously compiled. Earlier that day, the panel had decided to limit its recount to the 10,750 "undervotes," that is, ballots on which no vote was registered by counting machines. The Board's stated reason for the suspension of the manual recount was that it would be impossible to complete the recount before the deadline set forth by this Court. At the time that the Board suspended the recount, approximately 9,000 of the 10,750 undervotes had not yet been reviewed. In the two days that the Board had counted ballots, the Board identified 436 additional legal votes (from 20 percent of the precincts, representing 15 percent of the votes cast) which the machines failed to register, resulting in a net vote of 168 votes for Gore. Nonetheless, in addition to suspending further recounting, the Board also determined that it would not include the additional 436 votes that had been tabulated in its partially completed recount.

Specifically as to Miami-Dade County, the trial court found:

> *[A]lthough the record shows voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in Miami-Dade and Palm Beach Counties, which these counties have been aware of for many years*, these balloting and counting problems cannot support or effect any recounting necessity with respect to Miami-Dade County, absent the establishment of a reasonable probability that the

> statewide election result would be different, which has not been established in this case.
>
> The Court further finds that the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

This statement is incorrect as a matter of law. In fact, as the Third District determined in *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000), the results of the sample manual recount and the actual commencement of the full manual recount triggered the Canvassing Board's "mandatory obligation to recount all of the ballots in the county." In addition, the circuit court was bound at the time it ruled to follow this appellate decision. This Court has determined the decisions of the district courts of appeal represent the law of this State unless and until they are overruled by this Court, and therefore, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

However, regardless of this error, we again note the focus of the trial court's inquiry in an election contest authorized by the Legislature pursuant to the express statutory provisions of section 102.168 is not by appellate review to determine whether the Board properly or improperly failed to complete the manual recount. Rather, as expressly set out in section 102.168, the court's responsibility is to determine whether "legal votes" were rejected sufficient to change or place in doubt the results of the election. Without ever examining or investigating the ballots that the machine failed to register as a vote, the trial court in this case concluded that there was no probability of a different result. First, as we stated the trial court erred as a matter of law in utilizing the wrong standard. Second, and more importantly, by failing to examine the specifically identified group of uncounted ballots that is claimed to contain the

rejected legal votes, the trial court has refused to address the issue presented. Appellants have also been denied the very evidence that they have relied on to establish their ultimate entitlement to relief.[17] The trial court has presented the plaintiffs with the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence. We also note that whether or not the Board could have completed the manual recount by November 26, 2000, or whether the Board should have fulfilled its responsibility and completed the full manual recount it commenced, the fact remains that the manual recount was not completed through no fault of the Appellant.[18]

3300 Votes in Palm Beach County

Appellants also contend that the trial court erred in finding that they failed to satisfy their burden of proof with respect to the 3,300 votes that the Palm Beach County Canvassing Board reviewed and concluded did

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[17]The Miami-Dade Canvassing Board stated as its reasons that it stopped an ongoing manual recount because it determined that it could not meet this Court's certification deadline. However, nothing in this Court's prior opinion nor the statutory scheme governing manual recounts would have prevented the Board from continuing after certification the manual recount that it had properly started. The Canvassing Board is a neutral ministerial body. *See Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (Fla. 3d DCA 1984). Therefore, although the Board may have acted in a neutral fashion, the fact remains that three other Boards (Broward, Palm Beach and Volusia) completed the recounts.

[18]On Thanksgiving Day, November 23, 2000, an Emergency Petition for Writ for Mandamus was filed in which Gore sought to compel the Miami-Dade Canvassing Board to continue with the manual recount. Although we denied relief on that same day, in our order denying this relief, the Court specifically stated that the denial was "without prejudice to any party raising any issue presented in the writ in any future proceeding." Accordingly, at the time that we denied mandamus relief we clearly contemplated that this claim could be raised in a contest action.

not constitute "legal votes" pursuant to section 102.168(3)(c). However, unlike the approximately 9,000 ballots in Miami-Dade that the County Canvassing Board did not manually recount, the Palm Beach County Canvassing Board *did* complete a manual recount of these 3,300 votes and concluded that, because the intent of the voter in these 3,300 ballots was not discernable, these ballots did not constitute "legal votes." After a two-day trial in this case, the circuit court concluded:

> [W]ith respect to the approximately 3,300 Palm Beach County ballots of which plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process and has judged those ballots which plaintiffs wish this court to again judge de novo. . . . The Palm Beach County board did not abuse its discretion in its review and recounting process. Further, it acted in full compliance with the order of the circuit court in and for Palm Beach County.

We find no error in the trial court's determination that appellants did not establish a preliminary basis for relief as to the 3300 Palm Beach County votes because the appellants have failed to make a threshold showing that "legal votes" were rejected. Although the protest and contest proceedings are separate statutory provisions, when a manual count of ballots has been conducted by the Canvassing Board pursuant to section 102.166, the circuit court in a contest proceeding does not have the obligation de novo to simply repeat an otherwise-proper manual count of the ballots. As stated above, although the trial court does not review a Canvassing Board's actions under an abuse of discretion standard, the Canvassing Board's actions may constitute evidence that a ballot does or does not qualify as a legal vote. Because the appellants have failed to introduce any evidence to refute the Canvassing Board's determination that the 3300 ballots did not constitute "legal votes," we affirm the trial court's holding as to this is-

sue. This reflects the proper interaction of section 102.166 governing protests and manual recounts and section 102.168 governing election contests.

Whether the vote totals must be revised to include the legal votes actually identified in the Palm Beach County and Miami-Dade County manual recounts?

Appellants claim that the certified vote totals must be amended to include legal votes identified as being for one of the presidential candidates by the County Canvassing Boards of Palm Beach County and Miami-Dade during their manual recounts. After working for a period of many days, the Palm Beach County Canvassing Board conducted and completed a full manual recount in which the Board identified a net gain of 215 votes for Gore.[19] As discussed above, the Miami-Dade Canvassing Board commenced a manual recount but did not complete the recount. During the partial recount it identified an additional legal votes, of which 302 were for Gore and 134 were for Bush, resulting in a net gain of 168 votes for Gore.

The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion was erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. In the same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being con-

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[19]Bush asserted that the audited total is 176 votes.

ducted or endanger the counting of Florida's electors in the presidential election.

As to Miami-Dade County, in light of our holding that the circuit court should have counted the undervote, we agree with appellants that the partial recount results should also be included in the total legal votes for this election. Because the county canvassing boards identified legal votes and these votes could change the outcome of the election, we hold that the trial court erred in rejecting the legal votes identified in the Miami-Dade County and Palm Beach County manual recounts. These votes must be included in the certified vote totals. We find that appellants did not establish that the Nassau County Canvassing Board acted improperly.

CONCLUSION

Through no fault of appellants, a lawfully commenced manual recount in Dade County was never completed and recounts that were completed were not counted. Without examining or investigating the ballots that were not counted by the machines, the trial court concluded there was no reasonable probability of a different result. However, the proper standard required by section 102.168 was whether the results of the election were placed in doubt. On this record there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt. We know this *not* only by evidence of statistical analysis but also by the actual experience of recounts conducted. The votes for each candidate that have been counted are separated by no more than approximately 500 votes and may be separated by as little as approximately 100 votes. Thousands of uncounted votes could obviously make a difference.

Although in all elections the Legislature and the courts have recognized that the voter's intent is paramount, in close elections the necessity for counting all legal votes becomes critical. However, the need for ac-

curacy must be weighed against the need for finality. The need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.[20] As recognized by the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts:

> [A]ll election contests and recounts can be traced to either an actual failure in the election system or a perception that the system has failed. Public confidence in the election process is essential to our democracy. *If the voter cannot be assured of an accurate vote count*, or an election unspoiled by fraud, *they will not have faith in other parts of the political process*. Nonetheless, it is inevitable that legitimate doubts of the validity and accuracy of election outcomes will arise. It is crucial, therefore, to have clearly defined legal mechanisms for contesting or recounting election results.

Id. at 21 (emphasis supplied) (footnote omitted).

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[20]This Presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts. While there are areas in this State which implement systems (such as the optical scanner) where the margins of error, and the ability to demonstrably verify those margins of error, are consistent with accountability in our democratic process, in these election contests based upon allegations that functioning punch-card voting machines have failed to record legal votes, the demonstrated margins of error may be so great to suggest that it is necessary to reevaluate utilization of the mechanisms employed as a viable system.

Only by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made. As stated above, one of the provisions of the contest statute, section 102.168(8), provides that the circuit court judge may "fashion such orders as he . . . deems *necessary to ensure that each allegation in the complaint* is investigated, *examined* or checked, to prevent any alleged wrong, and to provide any *relief appropriate under such circumstances*. (emphasis supplied).

In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the various appellees and intervenors that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree. While we recognize that time is desperately short, we cannot in good faith ignore both the appellant's right to relief as to their claims concerning the uncounted votes in Miami-Dade County nor can we ignore the correctness of the assertions that any analysis and ultimate remedy should be made on a statewide basis.[21]

We note that contest statutes vest broad discretion in the circuit court to "provide any relief appropriate under

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[21]The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

the circumstances." Section 102.168(5). Moreover, because venue of an election contest that covers more than one county lies in Leon County, *see* 102.1685, Florida Statutes (2000), the circuit court has jurisdiction, as part of the relief it order, to order the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located.[22]

Accordingly, for the reasons stated in this opinion, we reverse the final judgment of the trial court dated December 4, 2000, and remand this cause for the circuit court to immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate. The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County[23] and the 168 additional legal votes from Miami-Dade County.

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[22]We are mindful of the fact that due to the time constraints, the count of the undervotes places demands on the public servants throughout the State to work over this week-end. However, we are confident that with the cooperation of the officials in all the counties, the remaining undervotes in these counties can be accomplished within the required time frame. We note that public officials in many counties have worked diligently over the past thirty days in dealing with exigencies that have occurred because of this unique historical circumstance arising from the presidential election of 2000. We commend those dedicated public servants for attempting to make this election process truly reflect the vote of all Floridians.

[23]*See* discussion at n.6, *supra*.

Because time is of the essence, the circuit court shall commence the tabulation of the Miami-Dade ballots immediately. The circuit court is authorized, in accordance with the provisions of section 102.168(8), to be assisted by the Leon County Supervisor of Elections or its sworn designees. Moreover, since time is also of the essence in any statewide relief that the circuit court must consider, any further statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade undervotes.

In tabulating the ballots and in making a determination of what is a "legal" vote, the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a "legal" vote if there is "clear indication of the intent of the voter." Section 101.5614(5), Florida Statutes (2000).

It is so ordered.

ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, C.J., dissents with an opinion.
HARDING, J., dissents with an opinion, in which SHAW, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., dissenting.

I join Justice Harding's dissenting opinion except as to his conclusions with regard to error by Judge Sauls and his conclusions as to the separateness of section 102.166 and 102.168, Florida Statutes (2000). I write separately to state my additional conclusions and concerns.

I want to make it clear at the outset of my separate opinion that I do not question the good faith or honorable intentions of my colleagues in the majority. However, I could not more strongly disagree with their deci-

sion to reverse the trial court and prolong this judicial process. I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.

My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates.

Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.

On the basis of my analysis of Florida law as it existed on November 7, 2000, I conclude that the trial court's decision can and should be affirmed. Under our law, of course, a decision of a trial court reaching a correct result will be affirmed if it is supportable under any theory, even if an appellate court disagrees with the trial court's reasoning. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-645 (Fla. 1999). I conclude that there are more than enough theories to support this trial court's decision.

There are two fundamental and historical principles of Florida law that this Court has recognized which are relevant here. First, at common law, there was no right

to contest an election; thus, any right to contest an election must be construed to grant only those rights that are explicitly set forth by the Legislature. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981). In *Flynn*, we held that, "[a]t common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power." *Id.* at 667.

Second, this Court gives deference to decisions made by executive officials charged with implementing Florida's election laws. *See Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840 (Fla. 1993). In *Krivanek*, we said:

> We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:
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> > The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and

> promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id. at 844-45. These two concepts are the foundation of my analysis of the present case.

At the outset, I note that, after an evidentiary hearing, the trial court expressly found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes based upon the evidence presented. I conclude this finding should curtail this Court's involvement in this election through this case and is a substantial basis for affirming the trial court. Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections. This to me is the import of this Court's decision in *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975). We lowered that threshold somewhat in *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998), but we continued to require a substantial noncompliance with election laws. That must be the very lowest threshold for a court's involvement.

Otherwise, we run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters–not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is "the right thing to do." Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, always has the poten-

tial of leading to a crisis with the other branches of government and raises serious separation-of-powers concerns.

I find that the trial judge correctly concluded that plaintiffs were not entitled to a manual recount. Petitioners filed this current election contest after protests in Palm Beach and Miami-Dade Counties. Section 102.168, Florida Statutes, in its present form is a new statute adopted by the Legislature in 1999. I conclude that the present statutory scheme contemplates that protests of returns[24] and requests for manual recounts[25] are first to be presented to the county canvassing boards. *See* § 102.166, Fla. Stat. This naturally follows from the fact that, even with the adoption of the 1999 amendments to section 102.168, the only procedures for manual recounts are in the protest statute. Once a protest has been filed, a county canvassing board then has the discretion, in accordance with the procedures set forth in section 102.166(4), Florida Statutes, whether to order a sample limited manual recount. *See* § 102.166(4)(c), Fla. Stat. (2000). Once the sample recount is complete and the county canvassing board concludes that there was an error in the vote tabulation that could affect the outcome of the election, section 102.166(5) instructs what must then be done. One option is to manually recount *all* ballots. *See* § 102.166(5)(c), Fla. Stat. (2000).[26]

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[24]*See* § 102.166(1), Fla. Stat. (2000).

[25]*See* § 102.166(4)(b), Fla. Stat. (2000).

[26]Also problematic with the majority's analysis is that the majority only *requires* that the "under-votes" are to be counted. How about the "over-votes?" Section 101.5614(6) provides that a ballot should not be counted "[i]f an elector marks more names than there are persons to be elected to an office," meaning the voter voted for more than one person for president. The underlying premise of the majority's rationale is that in such a close race a manual review of ballots rejected by the machines is necessary to ensure that all legal

I believe that the contest and protest statutes must logically be read together. The contest statute has significant references to the protest statute. If there is a protest, a party authorized by the statute to file a contest must file a complaint "within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1)." §102.168(2), Fla. Stat. (2000). In the election contest, the canvassing board is the proper party defendant under section 102.168(4). Further, under section 102.168(8), the circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that the allegations upon which the complaint is brought are investigated, examined, or checked.

I find correct the analysis undertaken in *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992), a case recently cited by this Court in *Palm Beach County Canvassing Board v. Harris*, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000). In *Hogan*, the Fourth District Court of Appeal reversed the trial court's order granting a manual recount, in contravention of the county canvassing board's decision noting that:

> Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the

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votes cast are counted. The majority, however, ignores the over-votes. Could it be said, without reviewing the over-votes, that the machine did not err in not counting them?

It seems patently erroneous to me to assume that the vote-counting machines can err when reading under-votes but not err when reading over-votes. Can the majority say, without having the over-votes looked at, that there are no legal votes among the over-votes?

> votes as a matter to be decided within the discretion of the canvassing board.

Id. at 510. I do not believe there is any sound reason to conclude that the Legislature's adoption of revised section 102.168 in 1999 intended to change this and provide for a duplicative recount by an individual circuit judge.

I also agree with the trial judge's conclusion that in a statewide election the only way a court can order a manual recount of ballots that were allegedly not counted because of some irregularity or inaccuracy in the balloting or counting process is to order that the votes in all counties in which those processes were used be recounted. I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide recount. To the contrary, I find the majority's decision in that regard quite extraordinary.

Section 102.168(3), Florida Statues (2000), states in pertinent part:

> The *grounds* for contesting an election under this section are:
>
> . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(Emphasis added.) In other words, to establish a cause of action, plaintiff must allege an irregularity that places in doubt the result of the election. First, to "contest" simply means to challenge. *See Webster's Dictionary* 250 (10th ed. 1994). Second, section 102.168(5), provides:

> A statement of the *grounds of contest* may not be rejected, nor the proceedings dismissed, by the court for any want of form if the *grounds of contest* provided in the statement *are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.*

(Emphasis added.) Upon my reading of the statute, I conclude that the language "grounds of contest" unambiguously means: a basis upon which a plaintiff can establish a cause of action. This standard is simply the threshold that must be met to bring forth the contest action. Thus, this standard is *not* the standard that the judge must use in deciding whether a plaintiff who brings the contest has *successfully* met his or her burden to order a recount or set aside election results. Although it is unclear from case law what standard must be satisfied in order to grant appropriate relief, it undoubtedly cannot be a low standard. Recently, in *Beckstrom*, this Court declined to invalidate an election despite a finding that the canvassing board was grossly negligent and in substantial noncompliance with the absentee voting statutes. *See Beckstrom*. Thus, merely stating the cause of action under the contest statute does not entitle a party to a recount or require the court to set aside an election. More must be required. This is especially true here, where, as in *Beckstrom*, the trial judge found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes. Thus, a plaintiff's burden in establishing grounds on which a circuit judge could order relief of any kind was simply not met. It is illogical to interpret section 102.168(3)(c) to set such a low standard where a plaintiff merely has to allege a cause of action to successfully carry the contest.[27]

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[27]In addition, under a protest the threshold that must be met to order a recount must be lower than that under a contest, which

Furthermore, even conceding that the trial judge at the outset applied an erroneous "probability of doubt" standard in deciding that plaintiffs failed to meet their burden of establishing a cause of action, the trial judge faced a conundrum that must be adequately explained. Plaintiffs asked the trial judge to grant the very remedy–a recount of the under-votes–he prays for without first establishing that remedy was warranted. Before any relief is granted, a plaintiff must allege that enough legal votes were rejected to place in doubt the results of the election. However, in order for the plaintiffs to meet this burden, the under-vote ballots must be preliminarily manually recounted. Following this logic to its conclusion would require a circuit court to order partial manual recounts upon the mere filing of a contest. This proposition plainly has no basis in law.

As I have stated, I conclude in the case at bar that sections 102.166 and 106.168 must be read in pari materia. My analysis in this regard is bolstered in situations, as here, where there was an initial protest filed in a county pursuant to section 102.166 and a subsequent contest of that same county's return pursuant to section 102.168. It appears logical to me that a circuit judge in a section 102.168 contest should review a county canvassing board's determinations in a section 102.166 protest under an abuse-of-discretion standard. I see no other reason why the county canvassing board would be a party defendant if the circuit court is not intended to evaluate the canvassing board's decisions with respect to manual recount decisions made in a section 102.166 protest. Finally, it is plain to me that it is only in section 102.166 that there are any procedures for manual recounts which address the logistics of a recount, includ-

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action can only be brought after certification of the returns. Therefore, the threshold to successfully carry a contest must be higher than that of a mere protest.

ing who is to conduct the count, that it is to take place in public, and what is to be recounted.[28]

The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection con-

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[28]I am persuaded that even with these procedures manual recounts by the canvassing board are constitutionally suspect. *See Touchston v. McDermott*, No. 00-15985 (U.S. 11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting). This would be compounded by giving that power to an individual circuit judge and providing him or her with no standards.

cerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.[29]

Based upon this analysis and adhering to the interpretation of the 1992 *Hogan* case, I conclude the circuit court properly looked at what the county canvassing boards have done and found that they did not abuse their discretion. Regarding Miami-Dade County, I find that the trial judge properly concluded that the Miami-Dade Canvassing Board did not abuse its discretion in deciding to discontinue the manual recount begun on November 19, 2000. Evidence presented at trial indicated that the Miami-Dade Board made three different decisions in respect to manual recounts. The first decision was not to count, the second was to count, and the third was not to count. The third decision was based upon the determination by the Miami-Dade Board that it could not make the November 26, 2000, deadline set by this Court in *Harris* and that it did not want to jeopardize disenfranchising a segment of its voters. The law does not require futile acts. *See Haimovitz v. Robb*, 130 Fla. 844; 178 So. 827 (1937). Section 102.166(5)(c) *requires that, if there is a manual recount, all of the ballots have to be recounted.* I cannot find that the Miami-Dade Board's decision that *all* the ballots could not be manually recounted between November 22 and November 26, 2000, to be anything but a decision based upon reality. Moreover, not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount. Thus, I agree with the trial court that the Miami-Dade Board did not abuse its discretion in discontinuing the manual recount.

In respect to the Palm Beach County Canvassing Board, I likewise find that the trial judge did not err in

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[29] *See* n.5.

finding that the Palm Beach Board was within its discretion in rejecting the approximately 3300 votes in which it could not discern voter intent. As set forth in *Boardman*, the county canvassing boards are vested with the responsibility to make judgments on the validity of ballots, and its determinations will be overturned *only* for compelling reasons when there are clear, substantial departures from essential requirements of law. *See id.*, 323 So. 2d at 268 n 5. Petitioners have not met this burden.

I also agree with the trial judge that the Election Canvassing Commission (Commission) did not abuse its discretion in refusing to accept either an amended return reflecting the results of a partial manual recount or a late amended return filed by the Palm Beach Board. I conclude that it is plain error for the majority to hold that the Commission abused its discretion in enforcing a deadline set by this Court that recounts be completed and certified by November 26, 2000. I conclude that this not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.

As I stated at the outset, I conclude that this contest simply must end.

Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots. The Constitution reads in pertinent part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Art. II, § 1, cl. 2, U.S. Const. The Supreme Court has described this authority granted to the state legislatures as "plenary." *See McPherson v. Blacker*, 146 U.S. 1, 7 (1892). "Plenary" is defined as "full, entire, complete, absolute, perfect, [and] unqualified." *Black's Law Dictionary* 1154 (6th ed. 1990).

The Legislature has given to the county canvassing boards–and only these boards–the authority to ascertain the intent of the voter. *See* § 102.166(7)(b), Fla. Stat. (2000). Just this week, the United States Supreme Court reminded us of the teachings from *Blacker* when it said:

> [Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

Bush v. Palm Beach Canvassing Bd., No. 00-836, slip op. at 4-5 (U.S. Dec. 4, 2000) (quoting *Blacker*, 146 U.S. at 7). Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision.

Laying aside the constitutional infirmities of this Court's action today, what the majority actually creates is an overflowing basket of practical problems. Assuming the majority recognizes a need to protect the votes of Florida's presidential electors,[30] the entire contest must

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[30]As the Supreme Court recently noted, 3 U.S.C. § 5 creates a safe harbor provision regarding congressional consideration of a state's electoral votes should all contests and controversies be resolved at least six days prior to December 18, 2000, if made pursuant to the state of the law as it existed on election day. *See Bush* at 6. There

be completed "at least six days before" December 18, 2000, the date the presidential electors meet to vote. *See* 3 U.S.C. § 5 (1994). The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.

In that time frame, all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public.[31] Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day.

Another significant problem is that the majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial judge, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by Judge Sauls. A continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various can-

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is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision.

[31] *See* § 102.166(6), Fla. Stat. (2000).

vassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.

I must regrettably conclude that the majority ignores the magnitude of its decision. The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count–are they the same standards for all ballots statewide or a continuation of the county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

This Court's responsibility must be to balance the contest allegations against the rights of all Florida voters who are not involved in election contests to have their votes counted in the electoral college. To me, it is inescapable that there is no practical way for the contest to continue for the good of this country and state.

I am persuaded that Justice Terrell was correct in 1936 when he said:

> This court is committed to the doctrine that extraordinary relief will not be granted in case where it plainly appears that although the complaining party may be ordinarily entitled to it, *if the granting of such relief in the particular case will result in confusion and disorder and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.*

State v. Wester, 126 Fla. 49, 54, 170 So. 736, 738-39 (1936) (citations omitted; emphasis added).

For a month, Floridians have been working on this problem. At this point, I am convinced of the following.

First, there have been an enormous number of citizens who have expended heroic efforts as members of canvassing boards, counters, and observers, and as legal counsel who have in almost all instances, in utmost good faith attempted to bring about a fair resolution of this election. I know that, regardless of the outcome, all of us are in their debt for their efforts on behalf of representative democracy.

Second, the local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. §§ 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statues, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be; and (3) what standards to apply in counting the ballots statewide.

Third, under the United States Supreme Court's analysis in *Bush v. Palm Beach County Canvassing Board*, wherein the Supreme Court calls to our attention *McPherson v. Blacker*, 146 U.S. 1 (1892), there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections.

Fourth, there is no available remedy for the petitioners on the basis of these allegations. Quite simply, courts cannot fairly continue to proceed without jeopardizing the votes and rights of other citizens through a further count of these votes.

I must take seriously the counsel of the Supreme Court in *Bush*:

> Since [3 U.S.C.] §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at 6.

This case has reached the point where finality must take precedence over continued judicial process. I agree with a quote from John Allen Paulos, a professor of mathematics at Temple University, when he wrote that, "[t]he margin of error in this election is far greater than the margin of victory, no matter who wins."[32] Further judicial process will not change this self-evident fact and will only result in confusion and disorder. Justice Terrell and this Court wisely counseled against such a course of action sixty-four years ago. I would heed that sound advice and affirm Judge Sauls.

HARDING, J., dissenting.

I would affirm Judge Sauls' order because I agree with his ultimate conclusion in this case, namely that the Appellants failed to carry their requisite burden of proof and thus are not entitled to relief. However, in reaching his conclusion, Judge Sauls applied erroneous standards in two instances. First, in addressing the Appellants' challenges of the election certifications in Miami-Dade and Palm Beach Counties, the judge stated that "[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion."

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[32] "*The election is a tie, so let's get on with it,*" St. Petersburg Times, Dec. 3, 2000, at 3D.

Applying this standard, the judge concluded that the Miami-Dade County Canvassing Board did not abuse its discretion in any of its decisions in the review and recounting process. While abuse of discretion is the proper standard for assessing a canvassing board's actions in a section 102.166 protest proceeding, it is not applicable to this section 102.168 contest proceeding. Judge Sauls improperly intertwined these two proceedings and the standards applicable to each.

In 1999, the Florida Legislature extensively amended the contest statute to specify the grounds authorized for contesting an election and to set up a time frame for contests. *See* ch. 99-339, § 3, at 3547-49, Laws of Fla. The Legislature also amended the protest statute by eliminating the role of the circuit courts in protest proceedings. *See id.*, §1, at 3546. The county canvassing boards have been granted discretion to authorize a manual recount when requested by a candidate, political party, or political committee who seeks to protest the returns of an election as being erroneous. *See* § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board *may* authorize a manual recount.") (emphasis added).

In contrast, a contest proceeding involves a legal challenge to the outcome of an election. The circuit judge is statutorily charged with three tasks in a contest proceeding: (1) to ensure that each allegation in the contestant's complaint is investigated, examined, or checked; (2) to prevent or correct any alleged wrong; and (3) to provide any relief appropriate under such circumstances. *See* § 102.168(8), Fla. Stat. (2000). Where a contestant alleges that the canvassing board has rejected a number of legal votes "sufficient to change or place in doubt the result of the election" due to the board's decision to curtail or deny a manual recount, the circuit judge should examine this issue de novo and not under an abuse of discretion standard. § 102.168(3)(c), Fla. Stat. (2000).

Second, Judge Sauls erred in concluding that a contestant under section 102.168(3)(c) must show a "reasonable probability that the results of the election would have been changed." Judge Sauls cited the First District Court of Appeal's decision in *Smith v. Tynes*, 412 So. 2d 925, 926 (Fla. 1st DCA 1982), as establishing this standard for election contests. However, as discussed above, when the Legislature amended section 102.168 in 1999, it specified five grounds for contesting an election, including the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes *sufficient to change or place in doubt the result of the election.*" (Emphasis added.) *Smith v. Tynes*, which was decided in 1982, addressed the pre-amendment statute which did not specify the grounds for a contest. Thus, the current statutory standard controls here.

While I disagree with Judge Sauls on the standards applicable to this election contest, I commend him for the way that he conducted the proceedings below under extreme time constraints and pressure. Further, I believe that Judge Sauls properly concluded that there was no authority to include the Palm Beach County returns filed after the explicit deadline established by this Court.

I conclude that the application of the erroneous standards is not determinative in this case. I agree with Judge Sauls that the Appellants have not carried their burden of showing that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this *statewide* election. That failure of proof controls the outcome here. Moreover, as explained below, I do not believe that an adequate remedy exists under the circumstances of this case.

I conclude that Judge Sauls properly found that the evidence presented by Appellants, even if believed, was insufficient to warrant any remedy under section 102.168.

The basis for Appellants claim for relief under section 102.168 is that there is a "no-vote" problem, i.e., ballots which, although counted by machines at least once, allegedly have not been counted in the presidential election. The evidence showed that this no-vote problem, to the extent it exists, is a statewide problem.[33] Appellants ask that only a subset of these no-votes be counted.

In a presidential election, however, section 102.168, by its title, is an "Election" contest and, as such, it is not a local contest seeking to define the correct winner of the popular vote in any individual county. The action is to determine whether the Secretary of State certified the correct winner for the entire State of Florida. By its plain language, section 102.168(1) provides that only the "unsuccessful candidate" may contest an election. If this contest provision may be invoked as to individual county results, as argued by Appellants, then Vice President Gore's choice of the three particular counties was improper because he was not "unsuccessful" in those counties. I read the statute as applying to *statewide results* in statewide elections. Thus, Vice President Gore, as the unsuccessful candidate statewide, could contest the election results. However, in this contest proceeding, Appellants had an obligation to show, by a preponderance of the evidence, that the outcome of the statewide election would likely be changed by the relief they sought.

Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida

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[33]No-votes (ballots for which the no vote for Presidential electors was recorded) exist throughout the state, not just in the counties selected by Appellants. Of the 177,655 no-votes in the November 7, 2000, election in Florida, 28,492 occurred in Miami-Dade County and 29,366 occurred in Palm Beach County. *See* Division of Elections, Voter Turnout Report, S-DX 41; Division of Elections, General Election Results, S-DX 40.

election would be different if the "no-vote" in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient. It would be improper to permit Appellants to carry their burden in a statewide election by merely demonstrating that there were a sufficient number of no-votes that could have changed the returns in isolated counties. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether a sufficient number of uncounted legal votes could be recovered from the statewide "no-votes" to change the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the subset of counties most favorable to that candidate.

Moreover, assuming that there may be some shortfall in counting the votes cast with punch card ballots, such a problem is only properly considered as being systemic with the punch card system itself, and any remedy would have had to be statewide. Any other remedy would disenfranchise tens of thousands of other Florida voters, as I have serious concerns that Appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As such, I would find that the selective recounting requested by Appellant is not available under the election contest provisions of section 102.168. Such an application does not provide for a more accurate reflection of the will of the voters but, rather, allows for an unfair distortion of the statewide vote. It is patently unlawful to permit the recount of "no-votes" in a single county to determine the outcome of the November 7, 2000, election for the next President of the United States. We are a nation of laws, and we have survived and prospered as

a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.

Finally, even if I were to conclude that the Appellant's allegations and evidence were sufficient to warrant relief, I do not believe that the rules permit an adequate remedy under the circumstances of this case. This Court, in its prior opinion, and all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000. *See* 3 U.S.C. § 5. This Court is "not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." *State v. Strasser*, 445 So. 2d 322, 322 (Fla. 1983). *See also Hoshaw v. State*, 533 So. 2d 886, 887 (Fla. 3d DCA 1988) ("The law does not require futile acts."); *International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc.*, 715 So. 2d 1025, 1028 (Fla. 5th DCA 1998) ("Florida law does not require trial courts to enter orders which are impossible to execute or which require parties to perform acts that cannot be of any force or effect."). Clearly, the only remedy authorized by law would be a statewide recount of more than 170,000 "no-vote" ballots by December 12. Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions. In order to undertake this unprecedented task, the majority has established standards for manual recounts–a step that this Court refused to take in an earlier case,[34] presumably because there was no authority for such action and nothing in the record to guide the Court in setting such standards. The same circumstances exist in this case. All of the parties should be afforded an opportunity to be heard on this very important issue.

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[34]*See Palm Beach County Canvassing Bd. v. Harris*, Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), *vacated by Bush v. Palm Beach Canvassing Bd.*, 531 U.S. ____ (2000).

While this Court must be ever mindful of the Legislature's plenary power to appoint presidential electors, *see* U.S. Const. art. II, § 1, cl. 2, I am more concerned that the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos. In giving Judge Sauls the option to order a statewide recount, the majority permits a remedy which was not prayed for, which is based upon a premise for which there is no evidence, and which presents Judge Sauls with options to order entities (i.e. local canvassing boards) to conduct recounts when they have not been served, have not been named as parties, but, most importantly, have not had the opportunity to be heard. In effect, the majority is allowing the results of the statewide election to be determined by the manual recount in Miami-Dade County because a statewide recount will be impossible to accomplish. Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable. The uncertainty of the outcome of this election will be greater under the remedy afforded by the majority than the uncertainty that now exists.

The circumstances of this election call to mind a quote from football coaching legend Vince Lombardi: "We didn't lose the game, we just ran out of time."

SHAW, J., concurs.

* * * * *

APPENDIX B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: CV 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, ET AL.,

Defendants.

[Dec. 4, 2000]

FINAL JUDGMENT

This action was tried before the court. The findings and conclusions in the ruling of the court from the bench in open court this day shall become a part hereof. Accordingly it is

ORDERED AND ADJUDGED that Plaintiffs Albert Gore, Jr. and Joseph I. Lieberman shall take nothing by the action and the Defendants may go hence without day.

DONE AND ORDERED in Chambers this 4th day December, 2000.

/s/
N. SANDERS SAULS
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State, STATE OF FLORIDA, et al.,

Defendants.

IN RE:	Ruling	
BEFORE:	HONORABLE N. SANDERS SAULS Circuit Court Judge	
DATE:	**Monday, December 3, 2000**	
TIME:	Commenced:	4:30 p.m.
	Concluded:	6:31 p.m.
LOCATION:	Leon County Courthouse Courtroom 3D Tallahassee, Florida	

Text of the decision by Judge N. Sanders Sauls of Leon County Circuit Court on Democratic presidential candidate Al Gore's contest of Florida's certified election results, as read by Sauls to the Courtroom:

* * * * *

[Page 6]

SAULS: All right. At this time we'd call the case of Albert Gore, et al, versus Katherine Harris, et al., Case Number 00-2808.

At this time, the action having been tried, the Court at this time will enter its rulings from the bench, as to

the exigencies surrounding this case, the rulings and findings shall be incorporated into the final judgment, and shall be immediately entered herein.

At this time, the Court finds and concludes as follows: The complaint filed herein states in its first paragraph that this is an action to contest the state certification in the presidential election of 2000, asserting that the State Elections Canvassing Commission's certification on in November 26, 2000, was erroneous, and the vote totals wrongly include illegal votes, and do not include legal votes that were improperly rejected.

Plaintiffs further contest the State of Florida's certification of the electors for George W. Bush and Richard Cheney as being elected.

They further challenge and contest the election certifications of the Canvassing Boards of Dade, Palm Beach, and Nassau Counties.

As to the Dade Canvassing Board, Plaintiffs seek to compel the Dade board to include in its certification, and

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the State Elections Canvassing Commission to include in the certification, a six-vote change in favor of Plaintiffs, resulting from the board's initial test and partial manual recount of one-percent of the countywide vote total conducted with respect to three precincts, designated by the Plaintiffs designees.

Also, additional votes manually hand-counted, and a further partial recount total resulting from the board's discretionary decision to stop completion of a full manual recount of all of the votes and all the precincts in Dade, because of insufficiency of time to complete the same.

These represent the results of the count of an additional 136 precincts of the 635 precincts in Dade County.

And, also, the results of any Court order, manual review and recount of some nine to ten thousand voter cards or ballots, which at Plaintiff's request, have been separated, or were separated as alleged undervotes by the Dade Canvassing Board, or the Dade Supervisor of Elections, as a result of all of the countywide ballots being processed through the counting machines a third time and being nonreadable by the machine.

As to the Palm Beach Canvassing Board, Plaintiffs seek to compel the Palm Beach board to include in its certification, and the State Elections Canvassing Commission to include in the state certification, additional votes

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representing the results of an attempted partial certification of results, completed before the November 26, 2000 deadline, mandated by the Florida Supreme Court, as well as the additional remainder of the results of the manual recount, which was completed after the deadline, and the attempted certification thereof on December 1.

And in addition, the result of any Court ordered manual review and recount of some 3,300 ballots which were objected to during the Palm Beach board's manual recount which Plaintiffs allege should have been counted as ballot votes because that board used an improper standard.

As to Nassau, the Nassau County Canvassing Board, the Plaintiffs seek to compel the Nassau board to amend its certification, and the State Elections Canvassing Commission to amend the state certification to reflect and include the results of the board's machine recount, rather than the results of the board's original machine count, thereby resulting in a favorable net gain to Plaintiffs, of 51 votes.

It is the established law of Florida as reflected in State v. Smith that where changes or charges of irregu-

larity of procedure or inaccuracy of returns in balloting and counting processes have been alleged, that the Court must find as a fact that a legal basis for ordering any recount exists before ordering such recount.

Further, it is well-established and reflected in the

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opinion of Judge Joanas and Smith v. Tine, that in order to contest election results under Section 102.168 of the Florida statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.

It is not enough to show a reasonable possibility that election results could have been altered by such irregularities or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

The Court further finds and concludes the evidence does not establish any illegality, dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes.

Secondly, there is no authority under Florida law or certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commission, nor authority to include any

[Page 10]

returns submitted past the deadline established by the Florida Supreme Court in this election.

Thirdly, although the record shows voter error, and/or, less than total accuracy, in regard to the punch-card voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years, these balloting and counting problems cannot support or effect any recounting necessity with respect to Dade County, absent the establishment of a reasonable probability that the statewide election result would be different, which has not been established in this case.

The Court further finds the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

Fourthly, with respect to the approximate 3,300 Palm Beach County ballots of which Plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process, and has judged those ballots which Plaintiff wish this Court to, again, judge de novo.

The old cases upon which Plaintiff rely were rendered upon mandamus prior to the modern statutory election system and remedial scheme enacted by the Legislature of the State of Florida in chapter 102 of the Florida Statutes.

The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

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The Palm Beach County Board did not abuse its discretion in its review and recounting process.

Further, it acted in full compliance with the order of the Circuit Court in and for Palm Beach County.

Having done so, Plaintiffs are estopped from further challenge of this process and standards. It should be noted, however, that such process and standards were

changed from the prior 1990 standards, perhaps contrary to Title III, Section (5) of the United States Code.

Furthermore, with respect to the standards utilized by the Board in its review and-counting processes, the Court finds that the standard utilized was in full compliance with the law and reviewed under another standard would not be authorized, thus creating a two-tier situation within one county, as well as with respect to other counties.

The Court notes that the Attorney General of the State of Florida enunciated his opinion of the law with respect to this, in a letter dated November 14, 2000, to the Honorable Charles E. Burton, Chair of the Palm Beach County Canvassing Board, which, in part, is as follows: "A two-tier system would have the effect of treating voters differently, depending upon what county they voted in."

The voter in a county where a manual count was conducted, would benefit from having a better chance of having his or her vote actually counted, than a voter in a

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county where a hand count was halted. As the State's chief legal officer, I feel a duty to warn that the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions.

This legal jeopardy could potentially leave Florida having all of its votes, in effect, disqualified, and this state being barred from the Electoral College's election of a President.

The Court finds further that the Nassau County Canvassing Board did not abuse its discretion in its certification of Nassau County's voting results.

Such actions were not void or illegal, and it was done with the proper exercise – within the proper exercise of its discretion upon adequate and reasonable public notice.

Further, this Court would further conclude and find that the properly stated cause of action under Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots, and of all the counties in this state with respect to the particular alleged irregularities or inaccuracies in

[Page 13]

the balloting or counting processes alleged to have occurred.

As recently stated by Judge Kline with the concurrence of Chief Judge Warner in the Fourth District Court of Appeal case, of Bedell v. Palm Beach Canvassing Board, Section 102.168 provides in Subsection (1) that the certification of elections may be contested for presidential elections. Section 103.011 provides that, "The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes."

There is in this type of election, one statewide election, and one certification. Palm Beach County did not elect any person as a presidential elector, but, rather, the election with the winner-take-all proposition, dependent on the statewide vote.

Finally, for the purpose of expedition, due to the exigencies surrounding these proceedings, this Court will deny those portions of the pending motions to dismiss of the various parties herein not affected by or ruled upon in these findings and conclusions in those portions consisting solely of matters of law being reviewable upon such denial.

In conclusion, the Court finds that the Plaintiff failed to carry the requisite burden of proof, and judgment shall be hereby entered, and that Plaintiffs will take nothing by this action. All ballots in the possession of the Clerk of this Court shall remain pending review. A judgment will be entered and filed with the Clerk immediately following this hearing.

(HEARING CONCLUDED AT 4:48 P.M.)

APPENDIX D

SUPREME COURT OF FLORIDA

NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, etc., et al.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, et al.,
Appellants,
vs.
KATHERINE HARRIS, etc., et al.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, etc., et al.
Appellees.

[Nov. 21, 2000]

PER CURIAM.

We have for review two related trial court orders appealed to the First District Court of Appeal, which certified the orders to be of great public importance requiring immediate resolution by this Court (Case Numbers SC00-2348 and SC00-2349). We have jurisdiction under article V, section 3(b)(5) of the Florida Constitution. For the reasons set forth in this opinion, we reverse the orders of the trial court.[1]

I. FACTS

A. The Election

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the United States, conducted a general election for the President of the United States. The Division of Elections ("Division") reported on Wednesday, November 8, that George W. Bush, the Republican candidate, had received 2,909,135 votes, and Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office (i.e., the difference was 1,784 votes), an automatic recount was conducted pursuant to section 102.141(4), Florida Statutes.[2] The recount resulted in a substantially re-

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[1]The Palm Beach County Canvassing Board has filed in this Court an "Emergency Petition for Extraordinary Writ" against Secretary of State Katherine Harris and others (Case Number SC00-2346). We have examined our jurisdiction under article V, section 3(b)(8) of the Florida Constitution. However, because the issue raised by that separate petition can be disposed of in our pending case and because we have previously stated in our order of November 16, 2000, that there was "no legal impediment" to the manual recounts continuing, we deem it unnecessary to determine if we have a separate basis of jurisdiction for entertaining the writ. Accordingly, by separate order we dismiss the petition.

[2]Section 102.141(4), Florida Statutes (2000), provides in pertinent part:

duced figure for the overall difference between the two candidates.

In light of the closeness of the election, the Florida Democratic Executive Committee on Thursday, November 9, requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to section 102.166, Florida Statutes (2000).[3] Pursuant to section 102.166(4)(d), the county canvassing boards of these counties conducted a sample manual recount of at least one percent of the ballots cast. Initial manual recounts demonstrated the following: In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore; and in Palm Beach County, a recount of four sample precincts yielded a net increase of nineteen votes for Gore. Based on these recounts, several of the county canvassing boards determined that the manual recounts conducted indicated "an error in the vote tabulation which could affect the outcome of the election." Based on this determination, several canvassing boards voted to conduct countywide manual recounts pursuant to section 102.166(5)(c).

B. The Appeal Proceedings

Concerned that the recounts would not be completed prior to the deadline set forth in section 102.111(1), Florida Statutes (2000), requiring that all county returns be certified by 5 p.m. on the seventh day after an election, the Palm Beach County Canvassing Board, pursuant to section 106.23, Florida Statutes (2000), sought an

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> (4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

[3]We have not discussed the events in Miami-Dade County because Miami-Dade is not a party nor has it sought to intervene in this case.

advisory opinion from the Division of Elections, requesting an interpretation of the deadline set forth in sections 102.111 and 102.112. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that absent unforeseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

Relying upon this advisory opinion, the Florida Secretary of State (the Secretary) issued a statement on Monday, November 13, 2000, that she would ignore returns of the manual recounts received by the Florida Department of State (the Department) after Tuesday, November 14, 2000, at 5:00 p.m. The Volusia County Canvassing Board (the Volusia Board) on Monday, November 13, 2000, filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief, and the candidates and the Palm Beach County Canvassing Board (the Palm Beach Board), among others, were allowed to intervene. In its suit, the Volusia Board sought a declaratory judgment that it was not bound by the November 14, 2000, deadline and also sought an injunction barring the Secretary from ignoring election returns submitted by the Volusia Board after that date.

The trial court ruled on Tuesday, November 14, 2000, that the deadline was mandatory but that the Volusia Board may amend its returns at a later date and that the Secretary, after "considering all attendant facts and circumstances," may exercise her discretion in determining whether to ignore the amended returns.[4] Later

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[4]The trial court's order reads in part:

> The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of

that day, the Volusia Board filed a notice of appeal of this ruling to the First District Court of Appeal, and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from all counties in the State. The Secretary then instructed Florida's Supervisors of Elections (Supervisors) that they must submit to her by 2 p.m., Wednesday, November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed to amend the certified returns previously filed. Four counties submitted their statements on time. After considering the reasons in light of specific criteria,[5] the Secretary on Wednesday, November 15,

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> state, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.
>
> Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

McDermott v. Harris, No. 00-2700, unpublished order at 7 (Fla. 2d Cir. Ct. Nov. 14, 2000).

[5]The criteria considered by the Secretary are as follows:

> Facts & Circumstances Warranting Waiver of Statutory Deadline

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1. Where there is proof of voter fraud that affects the outcome of the election. *In re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott v. Harris*, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

2000, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000.

On Thursday, November 16, 2000, the Florida Democratic Party and Albert Gore filed a motion in Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17, 2000.[6] That day, both the Democratic Party and Gore appealed to the First District Court of Appeal, which consolidated the appeals with the Volusia Board's appeal already pending there, and certified both of the underlying trial court orders to this Court based on the Court's "pass-through" jurisdiction.[7] By orders dated Friday, November 17, 2000, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission

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[6]The court's order reads in part:

> On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

McDermott v. Harris, No. 00-2700, unpublished order at 2 (Fla. 2d Cir. Ct. Nov. 17, 2000).

[7]*See* Art. V, § 3(b)(5), Fla. Const. ("[The Court may] review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance . . . and certified to require immediate resolution by the supreme court.").

(Commission) from certifying the results of the presidential election until further order of this Court.[8]

II. GUIDING PRINCIPLES

Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

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[8]Subsequently, the Volusia Board moved to voluntarily dismiss its appeal in this Court. The Court granted the motion, but indicated that the case style would remain the same and that Gore and the Palm Beach Board "would continue as intervenors/appellants in this action."

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). We consistently have adhered to the principle that the will of the people is the paramount consideration.[9] Our goal today remains the same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be. This fundamental principle, and our traditional rules of statutory construction, guide our decision today.

III. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?[10]

IV. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language "error in vote tabulation" to exclude the situation where a discrepancy between the original

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[9] *See State ex rel. Chappell v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that disenfranchisement of voters is not proper where there has been substantial compliance with the election statute and the intent of voter can be ascertained); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that courts should not frustrate will of voters if that will can be determined).

[10] Neither party has raised as an issue on appeal the constitutionality of Florida's election laws.

machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged with implementing and enforcing.[11] Florida courts, however, will not defer to an agency's opinion that is contrary to law.[12] We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.[13] Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.[14] The decision whether to conduct a manual recount is vested in the sound discretion of the Board.[15] If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the

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[11] *See Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994).

[12] *See Donato*, 767 So. 2d at 1153; *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996).

[13] § 102.166(4)(b), Fla. Stat. (2000).

[14] § 102.166(4)(c), Fla. Stat. (2000).

[15] *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

recount choosing the precincts to be recounted.[16] If the manual recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board "shall":

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; *or*
>
> (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an "error in the vote tabulation" only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."

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[16] *See* § 102.166(4)(d), Fla. Stat. (2000).

Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000) (emphasis added). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts, we must now determine whether the Commission[17] must

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[17]The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. *See* § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for Presi-

accept a return after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

V. THE APPLICABLE LAW

The abiding principle governing all election law in Florida is set forth in article I, section 1, Florida Constitution:

> SECTION 1. Political power.–All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I, § 1, Fla. Const. The constitution further provides that elections shall be regulated by law:

> SECTION 1. Regulation of elections.–All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. *Registration and elections shall, and political party functions may, be regulated by law*; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added).

The Florida Election Code ("Code"), contained in chapters 97–106, Florida Statutes (2000), sets forth specific criteria regulating elections. The Florida Secretary of State is the chief election officer of the state and is

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dent of the United States. Robert Crawford, Florida Commissioner on Agriculture, has been appointed to replace Florida Governor Jeb Bush. *See* § 102.111, Fla. Stat.

charged with general oversight of the election system.[18] The Supervisor of Elections ("Supervisor") in each county is an elected official[19] and is charged with appointing two Election Boards for each precinct within the county prior to an election.[20] Each Election Board is composed of inspectors and clerks,[21] all of whom must be residents of the county,[22] and is charged with conducting the voting in the election, counting the votes,[23] and certifying the results to the Supervisor[24] by noon of the day following the election.[25] The County Canvassing Board ("Canvassing Board" or "Board"), which is composed of the Supervisor, a county court judge, and the chair of the board of county commissioners,[26] then canvasses the returns countywide,[27] reviews the certificates,[28] and transmits the returns for state and federal officers to the Florida Department of State ("Department") by 5:00 p.m. of the seventh day following the election.[29] No deadline is set for filing corrected, amended, or supplemental returns.

The Elections Canvassing Commission ("Canvassing Commission" or "Commission"), which is composed of the Governor, the Secretary of State, and the Director

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[18] § 97.012, Fla. Stat. (2000).

[19] § 98.015, Fla. Stat. (2000).

[20] § 102.012(1), Fla. Stat. (2000).

[21] § 102.012(1), Fla. Stat. (2000).

[22] § 102.012(2), Fla. Stat. (2000).

[23] § 102.012(4), Fla. Stat. (2000).

[24] § 102.071, Fla. Stat. (2000).

[25] § 102.141(3), Fla. Stat. (2000).

[26] § 102.141(1), Fla. Stat. (2000).

[27] § 102.141(2), Fla. Stat. (2000).

[28] § 102.141 (3), Fla. Stat. (2000).

[29] §§ 102.111–.112, Fla. Stat. (2000).

of the Division of Elections, canvasses the returns statewide, determines and declares who has been elected for each office, and issues a certificate of election for each office as soon as the results are compiled.[30] If any returns appear to be irregular or false and the Commission is unable to determine the true vote for a particular office, the Commission certifies that fact and does not include those returns in its canvass.[31] In determining the true vote, the Commission has no authority to look beyond the county's returns.[32] A candidate or elector can "protest" the returns of an election as being erroneous by filing a protest with the appropriate County Canvassing Board.[33] And finally, a candidate, elector, or taxpayer can "contest" the certification of election results by filing a post-certification action in circuit court within certain time limits[34] and setting forth specific grounds.[35]

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[30] §§ 102.111, .121, Fla. Stat. (2000).

[31] § 102.131, Fla. Stat. (2000) ("If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the commission shall so certify and shall not include the returns in its determination, canvass, and declaration.").

[32] § 102.131, Fla. Stat. (2000) ("The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.").

[33] § 102.166, Fla. Stat. (2000).

[34] *See* § 102.168(2), Fla. Stat. (2000) (explaining that the action must be filed within ten days after the last Board certifies its returns or within five days after the last Board certifies its returns following a protest).

[35] The grounds for contesting an election are set forth in section 102.168(3), Florida Statutes (2000):

> (a) Misconduct, fraud, or corruption . . . sufficient to change or place in doubt the result of the election.
>
> (b) Ineligibility of the successful candidate . . . .

VI. STATUTORY AMBIGUITY

The provisions of the Code are ambiguous in two significant areas. First, the time frame for conducting a manual recount under section 102.166(4) is in conflict with the time frame for submitting county returns under sections 102.111 and 102.112. Second, the mandatory language in section 102.111 conflicts with the permissive language in 102.112.

A. The Recount Conflict

Section 102.166(1) states that "[a]ny candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later."

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot. . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section 102.166(4)(b) further pro-

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(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official or canvassing board member was given or offered a bribe . . . .

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.

vides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later:[36]

> (4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.
>
> *(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after*

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[36] As discussed in *Siegel v. Lepore*, 2000 WL 1687185 *6 (S.D. Fla. 2000):

> On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as evidenced by its plain language, is to remedy 'an error in the vote tabulation which could affect the outcome of the election.' Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

midnight of the date the election was held, whichever occurs later.

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board "may" authorize a manual recount[37] and such a recount must include at least three precincts and at least one percent of the total votes cast for the candidate.[38] The following procedure then applies:

> (5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.
>
> (6) Any manual recount shall be open to the public.
>
> (7) Procedures for a manual recount are as follows:
>
> (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
>
> (b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall

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[37]The statute does not set forth any criteria for determining when a manual recount is appropriate. *See* § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board may authorize a manual recount.").

[38]§ 102.166(4)(d), Fla. Stat. (2000).

be presented to the county canvassing board for it to determine the voter's intent.

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards "must" submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

B. The "Shall" and "May" Conflict

In addition to the conflict in the above statutes, sections 102.111 and 102.112 contain a dichotomy. Section 102.111, which sets forth general criteria governing the State Canvassing Commission, was enacted in 1951 as part of the Code and provides as follows:

102.111 Elections Canvassing Commission.–

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections

> shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored,* and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that returns not received after a certain date "may" be ignored and that members of the County Board "shall" be fined:

> 102.112 Deadline for submission of county returns to the Department of State; penalties.–
>
> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored* and the results on file at that time may be certified by the department.
>
> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's

> personal funds. Such fines shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32.
>
> (3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory, section 102.112 is permissive. While it is clear that the Boards must submit returns by 5 p.m. of the seventh day following the election or face penalties, the circumstances under which penalties may be assessed are unclear.

VII. LEGISLATIVE INTENT

Legislative intent–as always–is the polestar that guides a court's inquiry into the provisions of the Florida Election Code.[39] Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.[40] As noted above, however, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary. In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent.[41]

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[39] *See, e.g., Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

[40] *See, e.g., Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995).

[41] *See, e.g., Capers v. State*, 678 So. 2d 330 (Fla. 1996).

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.[42] In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for returns filed after the statutory date, noting that such returns "shall" be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the "deadline" for submitting returns and the "penalties" for submitting returns after a certain date; the statute expressly states that such returns "may" be ignored and that dilatory Board members "shall" be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.[43] In the present case, the provision in section 102.111 stating that the Department "shall" ignore returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.[44] In the present case, section

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[42] *See, e.g., State ex rel. Johnson v. Vizzini*, 227 So. 2d 205 (Fla. 1969).

[43] *See, e.g., McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

[44] *See, e.g., Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

102.112 contains a detailed provision authorizing the assessment of fines against members of a dilatory County Canvassing Board. The fines are personal and substantial, i.e., $200 for each day the returns are not received. If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless. For example, if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines. The fines thus serve as an alternative penalty and are applicable only if the Department may count the returns.

Fourth, related statutory provisions must be read as a cohesive whole.[45] As stated in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another." In this regard we consider the provisions of section 102.166 and 102.168.

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a protest is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5:00 p.m. on the

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[45] *See, e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code in 1951, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time and would be treated in a uniform fashion. Section 97.012(1) states that it is the Secretary's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 p.m. on the day of the election. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total vote of the county." Chapter 102 requires that the Board submit the returns by 5 p.m. on the seventh day following the election.

The Legislature thus envisioned that when returns are submitted to the Department, the returns "shall" embrace all the votes in the county, including absentee ballots. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;[46] overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do *not* have to be received by 7 p.m. of the day of the election, as provided by state law).[47] In light of the fact that overseas ballots cannot be

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[46]According to the Secretary, this matter is governed by consent decree with the federal government.

[47]*See* Fla. Admin. Code R.1S-2.013 (1998), which provides in relevant part:

counted until after the seven day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112.

Further, although county returns must be received by 5 p.m. on the seventh day following an election, the "official results" that are to be compiled in order to certify the returns and declare who has been elected must be construed in pari materia with section 101.5614(8), which specifies that "write-in, absentee *and manually counted results* shall constitute the official return of the election." (Emphasis added.)

Under this statutory scheme, the County Canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount , it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

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(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

VIII. THE RIGHT TO VOTE

The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded them a place of special privilege.[48] The Court long ago noted the venerable role the Declaration plays in our tripartite system of government in Florida:

> It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

State v. City of Stuart, 120 So. 335, 347 (Fla. 1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.

The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration. The very first words in the body of the constitution are as follows:

> SECTION 1. Political power.–*All political power is inherent in the people*. The enuncia-

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[48] *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992).

> tion herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I., § 1, Fla. Const. (emphasis added). The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.[49]

To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage:

> The declaration of rights expressly states that "all political power is inherent in the people." Article I, Section 1, Florida Constitution. The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]. . . . *Unreasonable or unnecessary* restraints on the elective process are prohibited.

Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (emphasis added).[50] Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizéns' right to vote:

> Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . . It is the in-

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[49] *See* Talbot D'Alemberte, *Commentary*, 25A Fla. Stat. Ann., Art. I, § 1, Fla. Const. (West 1991).

[50] *See also Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975) ("We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.").

> tention of the law to obtain an honest expression of the will or desire of the voter.

State ex rel. Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940).[51] Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.[52] Technical statutory requirements must not be exalted over the substance of this right.[53]

Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial and personal and are levied on each member of a Board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them.[54]

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[51] *See also State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . . .").

[52] *See, e.g., State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvest or restrain this right.").

[53] *See, e.g., Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) ("In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.").

[54] *Cf. Boardman v. Esteva*, 323 So. 2d 259, 268-69 (Fla. 1975) ("When the voters have done all that the statute has required them

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process.[55] In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Allowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent not only with the statutory scheme but with prior United States Supreme Court pronouncements:

> Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 25 (1972)(footnotes omitted).

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to do, they will not be disfranchised [sic] solely on the basis of the failure of the election officials to observe directory statutory instructions.").

[55] *See* 3 U.S.C. §§ 1-10 (1994).

In addition, an accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:

> The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those law are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

Pullen v. Milligan, 561 N.E.2d 585, 611 (Ill. 1990) (citations omitted).

IX. THE PRESENT CASE

The trial court below properly concluded that the County Canvassing Boards are required to submit their returns to the Department by 5:00 p.m. of the seventh day following the election and that the Department is not required to ignore the amended returns but rather may count them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

> The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statu-

> tory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000) (emphasis added).

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process. The Secretary in the present case has made no claim that either of these conditions apply at this point in time.

The above analysis is consistent with *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), wherein the Court addressed a comparable recount issue. There, the total votes cast for each of two candidates for a seat in the United State House of Representatives were separated by less than one-half of one percent; the county conducted a mandatory recount; the Board's certification of results was not received by the Department until two days after the deadline, although the Board had telephoned the results to the Department prior to the deadline; and the unsuccessful candidate sued to prevent the Department from counting the late votes. The Court concluded that the will of the electors supersedes any technical statutory requirements:

> [T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?"

Chappell, 536 So. 2d at 1008-09 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 267 (Fla. 1975)).

X. CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111. The statutory fines set forth in section 102.112 offer strong incentive to County Canvassing Boards to submit their returns in a timely fashion. However, when a Board certifies its returns after the seven-day period because the Board is acting in conformity with other provisions of the Code or with administrative rules or for other good cause, the Secretary may impose no fines. It is unlikely that the Legislature would have intended to punish a Board for complying with the dictates of the Code or some other law.

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

As explained above, the Florida Election Code must be construed as a whole. Section 102.166 governs manual recounts and appears to conflict with sections 102.111 and 102.112, which set a seven day deadline by

which County Boards must submit their returns. Further, section 102.111, which provides that the Secretary "shall" ignore late returns, conflicts with section 102.112, which provides that the Secretary "may" ignore late returns. In the present case, we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it -- the Legislature.

Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.[56]

Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on Novem-

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[56] At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties. Neither candidate requested such an opportunity.

ber 17, 2000, by this Court shall remain in effect until the expiration of the time for accepting amended certifications set forth in this opinion. The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.

It is so ordered. No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

* * * * *

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

CLARIFICATION OF ARGUMENT FOR APPELLEES GEORGE W. BUSH AND DICK CHENEY

[Dec. 7, 2000]

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POINTS OF CLARIFICATION

I. This Court Cannot Grant the Relief Requested

In response to Chief Justice Wells' questions at oral argument, Respondent George W. Bush hereby clarifies his position on this Court's jurisdiction over this challenge to the certification of the presidential election and electors. Under *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court made explicit that Article II authorizes the states to appoint electors only in "such Manner as the Legislature thereof may direct" and thus the federal Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25).[1]

Regardless of whether the Florida Election Code allows for some form of an appeal from a contest in these circumstances, it is absolutely clear under Florida and federal law that this Court does not have authority to grant the *relief* sought by Appellants. Appellants ask this Court to: 1) completely substitute itself for both the county canvassing boards and the state canvassing commission; 2) engage in a selective recount of certain ballots in a few Florida counties; 3) adopt an unprecedented "standard" for divining voter intent; and 4) declare the results of a statewide election of federal electors based upon this selective recount. This Court does

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[1] In particular, as the Supreme Court also made clear in *McPherson*, "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions . . . ." 146 U.S. at 34 (quoting Senate Rep. 1st Sess., 432 Cong. No. 395). Notwithstanding the preexisting Florida Rules of Appellate Procedure allowing appellate review of Circuit Court judgments generally, it is plain that, as Appellants plead this case, *this* case is before this Court jurisdictionally only by virtue of Article V, Section 3(b)(5) of the Florida Constitution.

not have authority to grant such relief under Florida law or federal law.

Moreover, doing so would clearly constitute a change in the manner in which Florida selected its electors, thus violating both the Federal Constitution and federal statute. This "judicially selected" slate of Presidential electors would not be validly chosen and, unlike the presently certified slate of electors, their votes would not be "conclusive" under 3 U.S.C. § 5 and the judicial mandate would be contrary to *McPherson v. Blacker*.

If, as Vice President Gore contends, this Court may conduct a *de novo* review of ballots, without deferring either to the manual recount decisions of county canvassing boards (such as Palm Beach) or to certified election results (such as the manually recounted votes certified in Volusia and Broward Counties), it must conduct a *de novo* review of the 176 votes counted by Palm Beach, *as well as* all manually recounted votes in Volusia and Broward. The Court plainly cannot erect a dual standard of deferring to canvassing boards when it *helps* Vice President Gore (for the 176 "votes" in Palm Beach and the 567 additional "votes" in Broward), but engage in *de novo* review of manual recount decisions challenged by Vice President Gore (*e.g.* the ballots rejected in Palm Beach and in Dade counties). Moreover, since a determination of who received the "highest number of votes" throughout the state is the only basis for determining which presidential candidate won and may be certified, the Court must also count *every* vote not registered by a machine.[2]

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[2]In addition to common sense, the plain language of 103.111 mandates this rule because it requires certification of the "candidates for President and Vice President who received the *highest number of votes*." Consequently, the Court cannot order or undo a certification unless it *knows* who received the highest number of votes – which it cannot do if that question is in doubt.

Additionally, for the first time in their brief to this Court, Appellants make the remarkable assertion that this Court should exercise *original* jurisdiction in this matter. They then ask the Court to engage in its own selective recount of certain ballots, declare a winner to the statewide Presidential election on this basis, nullify a previously certified result and actually direct the Secretary of State to "'certify as elected the presidential electors of' Al Gore and Joe Lieberman, under Section 113.011." Such a course of conduct would clearly violate the United States Constitution and federal statutes,[3] and, just as clearly, it is not authorized by Florida law. Since, as the Vice President acknowledges, this All Writs power is derived from "Article V of the Florida *Constitution*," the Court would violate Article II of the federal Constitution by exercising a power not given it by the Florida legislature. Mandamus or other equitable

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[3]Moreover, this Court is barred as a matter of federal law from "nullifying" a certification of an election by executive officials in the State of Florida or choosing its own set of judicially designated electors. After certification of an election pursuant to Florida law, which has now occurred, the manner of voting and the validity of the votes of Presidential electors is governed by federal law. Pursuant to 3 U.S.C. § 6, it is "the duty of the executive of each State" to communicate the selection of a slate of presidential electors to the Archivist of the United States. Under 3 U.S.C. § 15 it is *only* the votes of presidential electors "whose appointment has been lawfully certified according to section 6 of this title" that are deemed conclusive in the face of congressional challenge. Moreover, if two slates of electors are presented from any State and a dispute ensues between the two Houses of Congress, "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, *shall be counted*." 3 U.S.C. § 15 (emphasis added). Thus, appointing a competing judicially-selected slate of Gore electors is not an available form of relief as a matter of federal law. It would result in a contest in Congress, which 3 U.S.C. §§ 6 and 15 make clear would be won by the electors certified by the executive pursuant to the election itself – in this case the 25 Bush electors certified on November 26, 2000.

relief cannot lie because, as this Court has frequently noted, "the original and appellate jurisdiction of the Courts of Florida is derived entirely from article V of the Florida Constitution, *not* by the Florida legislature." *Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000). *See also, Dresner v. City of Tallahassee*, 134 So. 2d 228, 229 (Fla. 1961) ("This Court derives its appellate jurisdiction from article V, Florida Constitution.").

Ultimately, it is not the Florida Constitution nor is it the view of other State Supreme Courts that control the disposition of this matter. Nor is this matter amenable to resolution by resort to this Court's equitable powers, derived from the State Constitution or otherwise, to alter Florida's laws in effect as of Election Day. Nor can this matter be definitively resolved under any Florida case-law that was not decided under the modern Florida election code. Instead, it is the Florida Election Code, as enacted by the Florida Legislature pursuant to Article II of the U.S. Constitution–and that alone–that controls this case, and the relief that can be granted.

II. Under the Florida Election Code, Section 102.168 Does Not Apply to Presidential Elections, and to Apply it now Would Violate Article II of the U.S. Constitution, *McPherson v. Blacker*, and 3 U.S.C. § 5.

In addition to the question whether this Court has statutory jurisdiction over this appeal, there is no basis or precedent in Florida law for applying the ultimate judgment of a successful Section 102.168 contest proceeding at all to a presidential election. Indeed, by its terms, the Section 102.168 remedy does not apply to presidential elections.

This issue was recently addressed by the Circuit Court in its Order of November 20, 2000 in *Fladell v. The Elections Canvassing Comm'n of the State of Fla.*,

(15th Judicial Circuit).[4] The court, after an extensive analysis of the Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was *not* intended to apply to Presidential elections. *See id.* at 10-15.

The *Fladell* court noted that the provisions for certifying the election of presidential electors are set forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted §103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." *Fladell*, slip op. at 6. The Court further noted that Section 103.011, entitled "Electors of President and Vice President," makes *no* provision for a "contest" of the Presidential election. The Court concluded from this omission that the Florida Legislature did *not* intend for Section 102.168 to apply to Presidential elections.[5] *Id.* at 15. Rather, the Court held, "[a] review of the statutes that immediately follow §102.168 point to the conclusion that §102.168 was intended to apply to elected officers *other than the Presidency.*" *Id.* at 9, n.3 (emphasis added).

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[4]On December 1, 2000, the Florida Supreme Court concluded that rulings by the *Fladell* Court on this issue were unnecessary and affirmed on other grounds. *See Fladell v. Palm Bch. County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

[5]Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or *otherwise* ... the Governor may appoint a person to fill such vacancy ..." §103.021(5), Fla. Stat. (2000) (emphasis added). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. §103.061, Fla. Stat. (2000). However, while Florida law provides these mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

As the *Fladell* Court compellingly observed, "[s]urely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States." Slip op. at 9, n.3.

Simply put, then, this is an action by the wrong parties, seeking relief under the wrong statute, brought against the wrong defendants. And for this Court, or any Florida Court, to now extend Florida statutes to reach it, would run afoul of Article II of the U.S. Constitution, *McPhereson v. Blacker*, and 3 U.S.C. § 5.

* * * * *

APPENDIX F

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

AMENDED BRIEF OF APPELLEES GEORGE W. BUSH AND DICK CHENEY

[Dec. 6, 2000]

From the Second Judicial Circuit Court,
in and for Leon County,

Lower Tribunal No. 00-2808

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And *Fifth*, the Circuit Court noted that any post-election change in applicable standards for counting ballots – such as any newfound "dimple" standard, contrary to

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Palm Beach County's pre-existing standard – could constitute a change in law under 3 U.S.C. § 5 and therefore endanger Florida's electors. And, if ballots in one county were reviewed under a standard different than that applied in other counties, significant disparities could arise among in the impact of individual votes creating a situation that would violate federal constitutional standards.

* * * * *

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D. A Statewide Contest Would Require Statewide Recount.

In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168.

* * * * *

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II. THERE ARE FEDERAL CONSTITUTIONAL AND STATUTORY CONSIDERATIONS THAT APPLY TO THIS CASE AND THAT REQUIRE AFFIRMATION OF THE CIRCUIT COURT'S DECISION.

The Circuit Court found as a factual matter that the standard of vote counting in Palm Beach County that existed on November 7, 2000 was that embodied in a written 1990 guideline: that indentations or dimples will not count as votes. The court further noted that any change in that standard may, in turn, be contrary to 3 U.S.C. § 5. Indeed, for a court in a contest proceeding to now apply a standard that counts dimples as votes in selective counties would be directly contrary to 3 U.S.C. § 5, and it would also violate Article II, Section I of the U.S. Constitution. In addition, a change in the deadline for certification for election returns, along with a change in the time period for contesting an election, would likewise violate Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5. Finally, the application of counting standards in different counties as well as the

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occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution. As Florida's Attorney General recently opined, "[a]s the State's chief legal officer, I feel a duty to warn that [if] the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions." Findings at 12.

* * * * *

APPENDIX G

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, et. al.,

Plaintiffs,

v. CASE NO. 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, et. al.,

v.

BROWARD COUNTY CANVASSING BOARD, et. al.,

Third-Party Defendants.

_____/

[Dec. 2, 2000]

THIRD PARTY COMPLAINT OF DEFENDANTS GEORGE W. BUSH AND DICK CHENEY

* * * * *

[Page 4]

15. When it began the countywide recount on November 15, the Broward County Canvassing Board adopted a test under which chads with at least two corners separated ("hanging" and "swinging door" chads)

were counted, but "pregnant" chads (bulges but all corners attached) and "dimpled" chads (indentation but all corners attached) were not counted. At a hearing, Canvassing Board Chairman Lee stated that "unlike Dade . . . which adopted what they called an evolving case-by-case basis standard and Palm Beach which had the flip-flop standard, we adopted an objective standard . . . and we did it at the advice of the County Attorney, so that no one could say later we were trying to guess back and forth was this a vote, was it not a vote."

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16. On Friday, November 17, Democratic Party representatives filed suit in Broward County Circuit Court seeking a ruling that "pregnant" or "dimpled" chads also must be counted as votes. The Court did not grant their request.

17. On Saturday, November 18, Chairman Lee stated that the Broward County Canvassing Board would not change its procedure until a court clarified the standard for what constitutes a vote. However, on Sunday, November 19, Andrew J. Meyers, an attorney from the County Attorney's Office, appeared before the Board for the first time and argued that the two-corner rule was "impermissibly narrow" and that the Board needed to "determine the clear intent of each ballot whenever that intent can be determined."

18. By November 21, 2000, the Broward County Canvassing Board had completed a manual recount of 544 of the total 609 precincts. It was reported that based on that partial recount, the Democratic Presidential Electors gained a net of only 117 votes. Subsequently, after 604 of 609 precincts had been recounted, it was reported that the Democratic Presidential Electors had gained a net of 127 votes.

19. On Wednesday, November 22, 2000, all 609 precincts had been recounted, and it was reported that the Democratic Presidential Electors had a net gain of 137 votes.

20. During the manual recount, the Board had set aside a stack of ballots showing "undervotes." The Board intended to examine each of those ballots after

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the recount process was completed to establish voter intent, although no specific standard for ascertaining voter intent had been set, unless the Supreme Court ordered otherwise.

21. On Wednesday, November 22, the Board still had not established clear standards for evaluating the ballots set aside for further review.

22. On Thursday, November 23, and Friday, November 24, the Board used conflicting and malleable standards in evaluating the contested "dimple" ballots. The Board applied various arbitrary tests depending on the ballot; whether light shone through (the "sunshine" test), the "depth" of the dimple, whether other chads on the ballot had holes or dimples, and which party the voter appeared to favor.

23. In developing its tests, the Board purportedly relied on the *Pullen v. Mulligan* case cited by the Florida Supreme Court in its November 22 ruling in *Palm Beach Canvassing Board v. Harris*, even though the *Pullen* case did not involve "dimples."

24. The Democratic Presidential Electors' net gain grew to 369 after a counting session in which each member of the Canvassing Board employed a different standard for ascertaining voter intent.

25. Board member Gunzberger frequently applied the "light standard," inquiring whether light shone through the ballot.

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26. Board member Rosenberg counted ballots as to which there was "reasonable certainty" of voter intent. In implementing his standard, Rosenberg considered

whether there was a pattern of dimples or other dimples on a ballot. According to Rosenberg, a pattern of dimples on a ballot evidenced a voter's intent to vote. However, if there were punctured chads for candidates in other races, a dimpled chad did not demonstrate with reasonable certainty a voter's intent to vote.

27. Board member Lee admitted he divined voter intent by looking to see if the ballot was voted for Democrats in other races and, if so, inferred that the particular voter must have intended to vote for the Democratic Presidential Electors.

28. Board member Gunzberger acted arbitrarily and capriciously with the deliberate intent of maximizing votes for the Democratic Presidential Electors and minimizing votes for the Republican Presidential Electors. She manipulated and bent the ballots to try to see light. She considered dimpled ballots as votes for the Democratic Presidential Electors, but did not consider identical or similar ballots as votes for the Republican Presidential Electors. She was assisted by her personal attorney who was present during the counting. Their communications regarding her decisions about a voter's intent were not held publicly, in violation of the Florida Sunshine Law.

29. Broward County Canvassing Board members Lee and Gunzberger treated dimpled overvotes differently than dimpled undervotes. They ruled that a differently than dimpled undervotes. They ruled that a

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ballot containing a dimpled chad for one candidate and a punched chad for another candidate was not an overvote. This practice resulted in an inflated number of votes for the Democratic Presidential Electors.

30. The Broward County Canvassing Board improperly failed to reject ballots that included votes for more than one nominee for President of the United States. Republican recount observers reported that

overvotes were counted for the Democratic Presidential Electors.

31. The Broward County Canvassing Board conducted its manual recount employing a standard for determining voter intent that was inappropriate under Section 101.5614(5), (6) of the Florida Statutes. Some members of the Board improperly counted as votes indications and marks on a ballot that could not indicate an intent to vote.

32. The Broward County Canvassing Board followed a different standard for counting ballots than did the Palm Beach County Canvassing Board.

33. The Broward County manual recount was marked by irregularities and abuse, including, but not limited to, the following:

a. Ballot manipulation, tampering and degradation: Workers manipulated, rubbed their fingers across, and bent ballots, causing chads to fall out and making voter intent impossible to determine. Observers further reported that some ballots counted for the Democratic Presidential Electors showed ink marks and creases.

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Another counter manipulated a chad to make it more "pregnant." Another counter pounded a table with the ballots, causing a chad to fall out. County worker Evan Kolodny told workers they could push chads off the table, pick them up and keep them.

b. Abuse of discretion: Counters and county officials refused requests by observers for sufficient time to review the counts and for resolution of count disparities. On Sunday, November 19, the Board ejected a Republican observer for "excessive" challenges, and the observer was removed by a sheriff.

c. Inadequate security of ballots: Ballots were left unattended during lunch breaks, and recount observers reported that chads appeared on a table after a lunch break. After inquiry by observers, county workers replied that they knew "it's not a presidential chad."

d. Bias: Democratic party volunteers who were not county workers worked as counters counting ballots. County workers openly cheered for Gore. County workers encouraged Democratic observers to challenge Bush votes and told Republican observers not to challenge ballots.

e. Count disparities: Republican observers reported noting different counts for the Republican and Democratic Electors than recorded by county workers and reported observing inappropriate efforts to

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include votes that had been cast for the Republican Presidential Electors in the stack of ballots counted for the Democratic Presidential Electors. At least one such instance was broadcast live on network television as it occurred.

f. Fatigue: County workers showed signs of fatigue, which further calls into question the accuracy of the count.

34. The Broward County Canvassing Board finished manually recounting all ballots on November 25, 2000.

35. On November 26, 2000, the Broward County Canvassing Board certified new results to the Elections Canvassing Commission.

36. Plaintiffs Gore and Lieberman filed suit in Leon County Circuit Court to contest the elections results from Palm Beach, Miami-Dade, and Nassau Counties, but not Broward County.

37. The number of votes improperly counted as votes for the Democratic Presidential Electors through the Broward County Canvassing Board's illegal procedures greatly exceeds, by at least 200, the number of votes allegedly counted improperly as votes for the Republican Presidential Electors through these same procedures.

38. The changes the Broward County Canvassing Boar made to the policies and procedures that it historically had followed in connection with manual recounts violated the Due Process Clause of the Fourteenth Amendment and 3

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U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day.

39. If the Court grants Plaintiffs' request to recount ballots in Miami-Dade and Palm Beach Counties, then it must also order a recount of the ballots in Broward County.

40. If any ballots are recounted as a result of Plaintiffs' Complaint, the illegal votes counted in Broward County under the new rules established after the election should be excluded under the Due Process Clause and 3 U.S.C. § 5.

* * * * *

APPENDIX H

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for the Vice President of the United States,

Plaintiffs,

v. CASE NO: 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, Individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

And

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

And

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, and DAVID HOWARD (or, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

And

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON, and CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

And

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

[Nov. 30, 2000]

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS GEORGE W. BUSH AND RICHARD CHENEY TO COMPLAINT TO CONTEST ELECTION

* * * * *

[Page 13]

9. Plaintiffs' request that this Court count the votes cast by voters in two selected counties differently from those cast by voters in the remaining 65 counties would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Equal Protection and Due Process Clauses of the Florida Constitution. To the extent that Plaintiffs are allowed to introduce evidence of selective manual recounts of ballots in Miami-Dade and Palm Beach Counties, all ballots cast in those two counties and Nassau must be counted, as well as all the ballots in several other counties where Defendants Bush and Cheney

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have identified the counting of illegal votes and the exclusion of legal votes, including Broward, Volusia and Pinellas Counties.

10. The judicial limitations established by the Florida courts after the election regarding the discretion of state executive officials to certify election results and the standards applied to resolve controversies concerning the election of presidential electors, violate the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day. The new judicial rules imposed upon the state executive officials after the election reduced the margin of victory for the Republican Presidential Electors. Because Plaintiffs' Complaint is based on law, limitations and standards newly established only after the election, Plaintiffs are not entitled to the relief requested, and the Complaint should be dismissed with prejudice.

* * * * *

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13. During its manual recount after the election, the Broward County Canvassing Board changed the established policies and procedures that it had historically followed in connection with manual recounts, including the counting of "dimpled" ballots. That alteration of election laws after the election violates the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day. The constantly changing rules adopted by the Broward County Canvassing Board after the election illegally reduced the margin of victory for the Republican Presidential Electors. If any ballots are recounted as a result of the Complaint, the illegal votes counted in Broward County under the new rules established after the election should be excluded under the Due Process Clause and 3 U.S.C. § 5.

14. At all relevant times, the Broward County Canvassing Board during its manual recount conducted prior to November 26, 2000 employed an inappropriate

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standard to determine the clear intent of the voter under Section 101.5614(5) of the Florida Statutes. In particular, the Broward County Canvassing Board used a wholly subjective and partisan standard when examining the ballots and failed to examine each ballot as a whole under the totality of the circumstances. In doing so, the Board counted "indented" chads when the ballot as a whole did not demonstrate the clear intent of the voter. If any ballots are recounted as a result of the Complaint, the illegal votes counted in Broward County under the rules altered after the election should be excluded under Section 102.168(3)(c).

15. Prior to this election, the County Canvassing Boards in Miami-Dade and Palm Beach Counties never counted "dimpled" chads as legal votes. Therefore, the counting of "dimpled" chads as votes in this election, as Plaintiffs request, would violate the Due Process Clause of the Fourteenth Amendment and 3 U.S.C. § 5, which requires that a state resolve controversies relating to the election of electors under "laws enacted prior to" election day.

APPENDIX I

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL DIVISION

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for the Vice President of the United States,

Plaintiffs,

v. CASE NO. 00-2808

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, Individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

And

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

And

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, and DAVID HOWARD (or, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

And

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON, and CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

And

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Defendants.

_____/

[Nov. 30, 2000]

MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS GEORGE W. BUSH AND DICK CHENEY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO NAME INDISPENSABLE PARTIES, AND FAILURE TO STATE A CLAIM

* * * * *

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The Court made this ruling ([b]ecause of the unique circumstances and extraordinary importance of the present case..." *Id.* (slip op. at 39). The unique circumstance at issue is 3 U.S.C. § 5, which requires appointment of electors by December 12. The Court was mindful that this Federal law mandated results by a date certain when it noted the "interplay between our statutory and constitutional law at both the state and federal levels." *Id.* (slip op. at 29). To comply with the Federal electoral process, the Supreme Court of Florida decided that it could not permit manual recounts under Section 102.166 to stretch on indefinitely, and it imposed a deadline. Therefore, a county canvassing board that acts in compliance with the Supreme Court of Florida's deadline for manual recounts, a deadline based on the

preeminent position of Federal law in this particular matter, cannot be found to be in violation of a mandatory statutory act when its recount would violate that deadline.

* * * * *

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. . . (2) a full statewide or substantial recount is the only way to determine the present election contest and conducting such an election contest within the time constraints imposed by 3 U.S.C. § 5 is impossible;

* * * * *

APPENDIX J

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article II, § 1, cl. 2

Presidential Electors.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

* * * * *

Article II, § 1, cl. 4

Presidential Electors.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

* * * * *

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots

the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

3 U.S.C. 1

§ 1. Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. 2

§ 2. Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

* * * * *

3 U.S.C. 5

§ 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of

such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. 6

§ 6. Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvas or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title [3 U.S.C. § 7] to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made;

and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

* * * * *

3 U.S.C. 15

§ 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate

shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when the agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper pur-

porting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

* * * * *

THE CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE V—JUDICIARY

* * * * *

§ 3 Supreme court.

(a) Organization.--The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of the original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) Jurisdiction.--The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

(c) Clerk and marshal.--The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 97—QUALIFICATION AND REGISTRATION OF ELECTORS

* * * * *

97.012 Secretary of State as Chief Election Officer

The Secretary of State is the chief election officer of the state, and it is his or her responsibility to:

(1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.

* * * * *

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 102—CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS

* * * * *

102.111 Elections Canvassing Commission.

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the

seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

102.112 Deadline for submission of county returns to the Department of State; penalties.

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the[1] Election Campaign Financing Trust Fund, created by § 106.32.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

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[1] The trust fund expired, effective November 4, 1996, by operation of § 19(f), Art. III of the State Constitution.

102.141 County canvassing board; duties.

* * * * *

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

* * * * *

102.166 Protest of election returns; procedure.

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours

after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to § 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

* * * * *

102.168 Contest of election.

(1) Except as provided in § 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to

canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

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FLORIDA STATUTES
TITLE 9—ELECTORS AND ELECTIONS
CHAPTER 106—CAMPAIGN FINANCING

* * * * *

106.23 Powers of the Division of Elections.

(1) In order to carry out the responsibilities prescribed by § 106.22, the Division of Elections is empowered to subpoena and bring before its duly authorized representatives any person in the state, or any person doing business in the state, or any person who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the division are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter. Should any witness fail to respond to the lawful subpoena of the division or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, the division may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the witness's possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly. However, the refusal by a witness to answer inquiries or turn over evidence on the basis that such testimony or material will tend to incriminate such witness

shall not be deemed refusal to comply with the provisions of this chapter.

(2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.